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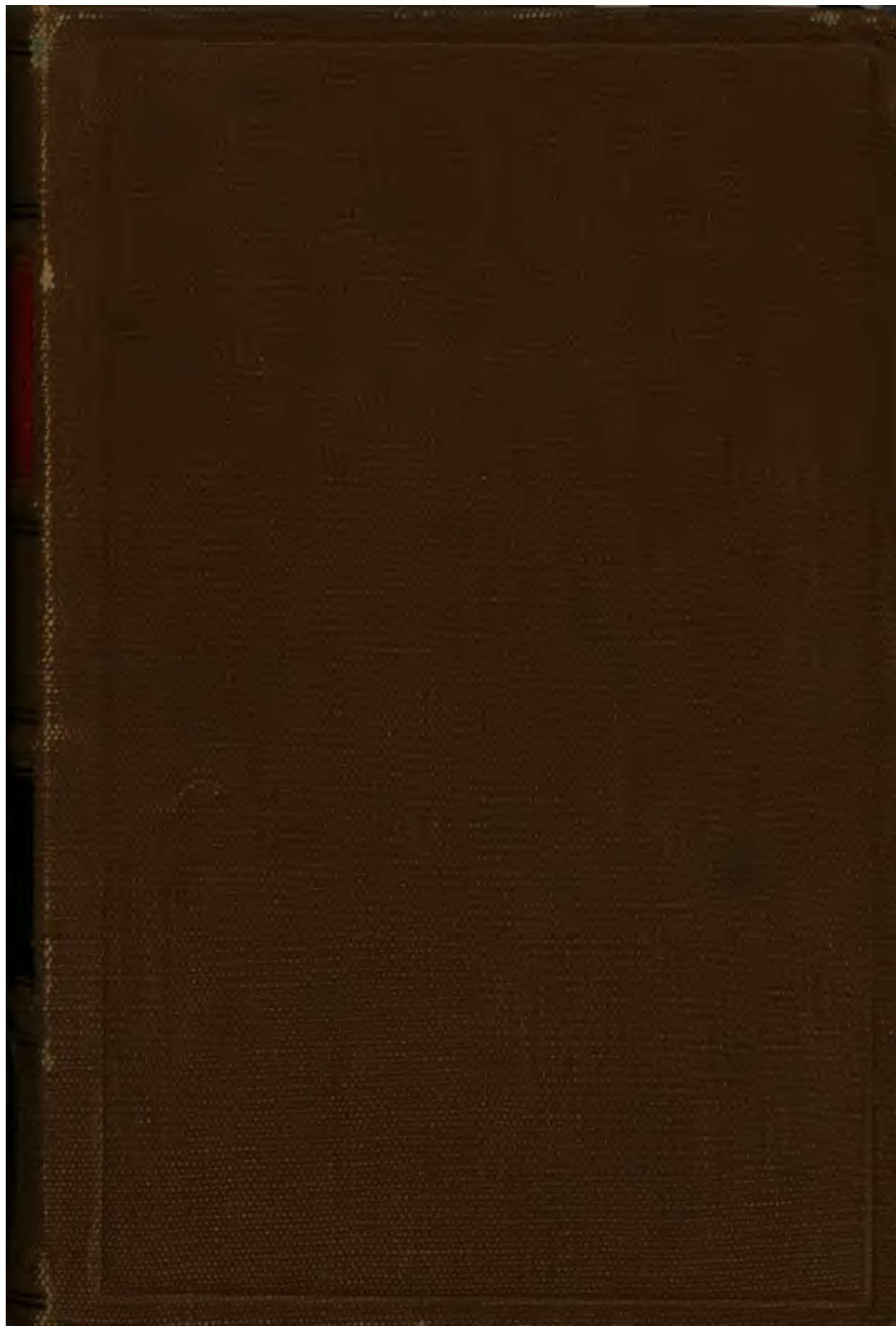
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CASES
ON THE
LAW OF TORTS

SELECTED AND ANNOTATED

By
FRANCIS H. BOHLEN
Professor of Law, University of Pennsylvania

IN TWO VOLUMES
VOLUME II

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BOOK III.

JUSTIFICATIONS, EXCUSES AND DEFENSES.

Part I.

Defense of Person or Property and the Assertion of Right in Respect Thereto.

CHAPTER I.

Self-Defense.

(a) Defense of one's person from wrongful violence.

CHAPLEYN OF GREYE'S INNE *v.* ———

Court of Eschequer, 1400. Y. B. 2 Henry IV, 8, pl. 40.

In an inquest by a chaplain of Greye's Inne for a battery done to him, etc. And the defendants had justified that the wrong which the plaintiff had was from his own assault. *Markham*. Although a man make an assault upon another, if he upon whom the assault is made can escape with his life, it is not lawful for him to beat the other, who made the assault, *quod tota curia concessit*. Cockayn, C. B. But I am not bound to wait till the other has given a blow, for perhaps it will come too late afterwards, *quod conceditur*.¹

¹ As late as 1319 it had been held in a plea of trespass for a battery that the plaintiff should recover his damages, and the defendant go to prison, though the beating given the plaintiff "was because of his own assault, since the defendant could not otherwise escape," Y. B. 12, Ed. II, 381 (Rolls Ed.). See also, accord Y. B. 21 & 22, Ed. I, 586 (1294).

In Anon., Y. B. 33 Henry VI, 18, pl. 10 (1455), it is held that *son assault demesne* is no plea to threats, unless the defendant has no other means of escape.

So late as 1532, a statute, 24 Hen. 8, c. 5, providing that "a man killing a thief in self-defense shall not forfeit his goods" contains words indicating that many killings in self-defense did even then involve forfeiture of goods. It is probable that at a very early period one killing another in self-defense might purchase his pardon from the king and it is highly doubtful whether this pardon was ever refused, none the less it was required, nor probably did it, when obtained, protect the slayer from suit by the dead man's kin. It is certain that a pardon for killing by misadventure did not, and the two are treated throughout as governed by the same principles, as in the Statute of Gloucester (1278), in which it was provided that one killing another "must put himself upon the country" and if the jurors find the killing to be by misadventure or in self-defense, "there on the report of the justices the king

STATE OF IOWA v. EVENSON.

Supreme Court of Iowa, 1904. 122 Iowa Reports, 88.

BISHOP, J. On the evening of December 15, 1902, the defendant, his brother, and two other young men were together on a side street of the town of Joice, in Worth county. They had been drinking intoxicating liquor, had indulged in much profane and obscene language, and there had been some fighting between them. After the fight was over, they moved to the main street of the town, where they stopped in front of a store. Here they continued their loud and boisterous talk, the same being more or less interspersed with profanity. In this situation a crowd of about a dozen citizens appeared on the scene, armed with horsewhips, and some of them announced to defendant and his companions that they would give them five minutes to get out of town. The defendant responded that "if they did not leave him alone he would lay some one cold." The citizens at once began using their whips on defendant and his companions, and when the whips were used up they resorted to their fists, one of the number also making use of a piece of board. Defendant and his companions were forced back up the street by the onslaught made upon them, defending themselves meanwhile by the use of their fists. As they passed a platform scale standing on the sidewalk, defendant took therefrom the weight hanger, and, swinging it around his head, told the crowd to keep back. At this juncture one of the citizens, named Bilstead, seized the brother of the defendant about the body, and the two began to struggle, when defendant stepped up and struck Bilstead with the hanger, the blow being sufficient to fell Bilstead to the walk.

The court, on its own motion, gave an instruction to the jury as follows: "The inhabitants of Joice had no right to drive the defendant and his party out of town by the use of force merely because they were fighting or using bad language in the streets. If the defendant and his party had committed or were committing any public offense, the remedy which the law gave the inhabitants of Joice was to arrest them, and take them before a magistrate or peace officer. On the other hand, if the defendant and his party had rea-

shall pardon if he will," see as to this subject Pollock and Maitland, *History of the English Law*, Vol. II, 476-481; Stephen, *History of the Criminal Law*, Vol. III, pp. 36-40, and Robert's Case, *Seldon Soc.*, Vol. I, *Pleas of the Crown* 70 (1203), *Y. B. 21 Ed. III*, 17 pl. 22 (1348) and Fitz-Herbert *Abr. Corone*, 284 (1330). It is curious that though Blackstone recognizes that homicide in self-defense was excusable rather than justifiable and cites the act of 24 Hen. VIII, *supra*, Vol. IV, p. 184, he none the less speaks of self-defense as being "the primary law of nature" which "is not, neither can be, in fact taken away by the law of society," Vol. III, 4. His influence is shown in many statements of the earlier American judges such as the following extract from the opinion of Wheeler, J. in *Lander v. State*, 12 Tex. 462 (1854), "It (self-defense) does not depend on any law of society. It is derived from a higher source, is coeval with man's natural being, and hence it is with truth and reason said that self-preservation is the first law of nature"; compare Grotius "*De Jure Belli et Pacis*", Lib. III, Cap. I.

sonable opportunity to leave the scene in safety and avoid a conflict with the town people when they approached with whips and threatened the use of force, then the defendant and his party should have taken that course, and avoided a conflict. But if the town people assailed the defendant and his party, so that they had no reasonable opportunity, after their intentions were known, to retire or retreat in safety, then they had the right to meet force with force, and defend themselves as in the case of any other assault." This instruction is complained of as error, the contention of counsel for appellant being that under the law the defendant, when threatened with an assault and battery, was not bound to retreat, but might stand his ground, and repel force with force, so long as he used only such force as was necessary. We think the doctrine thus contended for is sound. As applied to circumstances such as this record discloses, we do not understand it to be the law that one thus made the subject of attack is bound to retreat if there be time and opportunity to do so. In effect, the language of the instruction condemned was equivalent to saying to the jury that when one is assaulted, and the character thereof does not involve life or great bodily injury, the person assaulted, if he does not choose to stand and submit to a battery, must retreat if any way is open to him. Such is not the law. See, also, *Gallagher v. State*, 3 Minn. 270; *Com. v. Drum*, 58 Pa. 21; *State v. Bartlett*, 170 Mo. Sup. 658 (71 S. W. Rep. 148, 59 L. R. A. 756); *State v. King*, 104 Iowa, 724; McClain's Criminal Law. We do not overlook the many cases wherein it is held that one may not, under the plea of self-defense, justify the taking of human life, if it reasonably appears that the same could have been avoided by making use of an avenue of escape open to him.¹ But the principle thus declared upon has no application to a case where, as in the case at bar, one is wrongfully assaulted, and repels force by the

¹ See Dupree C. J. in *State v. Sherman*, 16 R. I. 631 (1889), generally a person wrongfully assailed cannot justify killing his assailant in mere self-defense, if he can safely avoid it by retreating. Retreat is not always obligatory even to avoid killing; for if attack be made with deadly weapons or murderous or felonious intent, the assailed may stand his ground and if need be kill his assailant, *Commonwealth v. Drum*, 58 Pa. St. 1 (1868); *Page v. State*, 141 Ind. 236 (1894), and see Professor J. H. Beale, Homicide in Self-Defense, 3 Col. L. R. 526, pp. 537-545, and 16 Harv. L. R. 567, and the valuable note to the case *State v. Gardner*, 2 L. R. A. (N. S.) 51 *et seq.*

In *Moran v. Vicroy*, 24 Ky. L. 2415 (1903), where the defendant shot the plaintiff, who had stepped towards him and raised and cocked his gun, it was held that the instruction asked, "that the defendant could only shoot if he had no apparently safe means of escape from the impending danger," had been frequently condemned by the Supreme Court of Kentucky. The right to kill without retreating if attacked in one's own house is clear, *People v. Lewis*, 117 Cal. 186 (1897), and see note to *State v. Gardner*, 2 L. R. A. (N. S.) 51. "If a man is in his house, and hears that such a one is coming to his house to beat him, he may well collect his friends and neighbors to help him in the defense of his person. But if one threatens to beat him if he goes to such a market or such other place, he may not lawfully collect his friends to protect him while going thither, because it is not necessary for him to go, and he may have his remedy by a bond to keep the peace. But one's house is his castle and defense where he may properly abide."—Note by Fineux C. J., Anon., Y. B. 21, Henry VII, 39, pl. 50 (1505).

use of like force. In the one case the law regards the liberty of the citizen to come and go as he pleases without molestation, save at the hands of the law, as the thing paramount. In the other case the law regards the temporary deprivation of the exercise of personal liberty on the part of one citizen as of less importance than is the life of another citizen, and this even though the latter is for the moment engaged in making an unlawful assault upon the former. Hence the injunction that a person assaulted must retreat, if he can do so in reasonable safety, before resorting to the extreme measure of taking the life of his assailant.

Conceding, therefore, that the provocation for the assault upon defendant was great, still, being wrongful, and the defendant having the right to resist in defense of himself and of his brother, it follows that the instruction given cannot be upheld.

The judgment is reversed, and the cause remanded for a new trial.

Reversed.²

GERMOLUS v. SAUSSER.

Supreme Court of Minnesota, 1901. 83 Minn. Rep. 141.

START, C. J. Action to recover damages for personal injuries sustained by the plaintiff by reason of an assault and battery perpetrated upon him November 21, 1899, by the defendant. The defense was that the act was done in self-defense. Verdict for the plaintiff for \$1,100, and the defendant appealed from an order denying his motion for a new trial.

All of the assignments of error, which are well assigned, relate to exceptions to the charge of the trial court to the jury. The evidence on the part of the plaintiff tended to show that the defendant made an unprovoked assault upon him, and struck him over the head with the heavy end of a whip stock, whereby the plaintiff was knocked senseless, and sustained serious injuries. The evidence also tends to show that there had been some words between the parties growing out of the fact that the plaintiff, who had been ploughing a field lying along the highway, had ploughed within the limits of the highway. The plaintiff had stopped his team, and was standing by the side of his plough, some ten rods from the highway, when the defendant struck him. The defendant's own testimony was to this effect:

² See accord: *State v. Sherman*, 16 R. I. 631 (1889); *Commonwealth v. Drum*, 58 Pa. St. 1 (1868); *Page v. State*, 141 Ind. 236 (1894); *Runyan v. State*, 57 Ind. 80 (1877); *Moran v. Vicroy*, 24 Ky. L. 2415 (1903). These are all criminal cases, but the principles governing the right of self-defense are the same in both criminal and civil actions, *Thomason v. Gray*, 82 Ala. 291 (1886).

Contra: *Howland v. Day*, 56 Vt. 318 (1883); *Armstrong v. Little*, 4 Pennw. 255 (Del. 1903); Woodruff J. in *Keyes v. Devlin*, 3 E. D. Smith 518 (N. Y. 1854), p. 524, and see Morton J. in *Monise v. Begaso*, 190 Mass. 87 (1906), pp. 88-89.

He (plaintiff) was ploughing and when he saw me driving on the highway he stopped his team, and called to me to come over, and repeated the call seven or eight times. I stopped my team, and asked him what he wanted. He said, "Come over this way." I got off the wagon, took my coat off, as it was too heavy (this was November 21st), and went over to the plaintiff, and asked him what he was calling to me for; and he swung his whip around hitting me on the arm, and I jerked it out of his hand, and hit him with it, and then he let himself drop. I had to hit him to protect myself. I had the whip near the stock, and I swung it over and gave it to him.

The trial court gave to the jury, with others, the instructions following:

"Now, in this case, you are to consider, in the first place, whether any element of self-defense enters into it. According to the testimony of the defendant himself, even if that were true, that the plaintiff struck at him with a whip stock, was it then necessary for him, to defend himself, to jerk it out of the plaintiff's hands, and then strike the plaintiff with it? He was only justified in doing that if it was necessary for his own protection, in his own self-defense."

"There is no full defense made out in this case, unless the defendant has established by a preponderance of the evidence that the battery committed upon the plaintiff, as admitted, was necessary for his own self-protection, and to prevent the plaintiff from further battering him."

It is the contention of the defendant that the first two instructions given were erroneous, in that they, in effect, made his right of self-defense depend upon an actual necessity for the use of force in order to protect himself, instead of upon the then apparent necessity of the situation, and withdrew from the jury the consideration of the question whether at the time the defendant entertained an honest and reasonable belief that it was necessary to use the force which he did use in order to protect himself. The rule as to self-defense is the same in civil and criminal actions. The rule is this: An act, otherwise criminal, is justifiable when it is done to protect the person committing it, or another whom he is bound to protect, from imminent personal injury, the act appearing reasonably necessary to prevent the injury, nothing more being done than is reasonably necessary. G. S. 1894, § 6308. This does not require that the necessity for doing the act must be actual; for it is sufficient if there is either a real or apparent necessity for so doing.¹ But the mere belief of a person that it is necessary to use force to prevent an injury to himself is not alone sufficient to make out a case of self-defense, for the facts as they appear to him at the time must be such as reasonably to justify such belief.²

¹ *Shorter v. People*, 2 N. Y. 193 (1849); *Goodall v. State*, 1 Ore. 333 (1861); *Murray v. Commonwealth*, 79 Pa. St. 311 (1875); *Enright v. People*, 155 Ill. 32 (1895).

² *Accord: Beck v. Minn. Union R. Co.*, 95 Minn. 73 (1905); *New Orleans*

It follows that the instructions in this case were not strictly accurate, but the error was without prejudice; for, upon the defendant's own testimony, we hold as a matter of law that he was not justified in beating the plaintiff. To hold otherwise would be a reproach to the administration of justice; for, accepting the defendant's own statement of what occurred, there was neither a real nor an apparent necessity for knocking the plaintiff down after he had been disarmed. Nor were the facts, viewed from any standpoint, such as reasonably to justify the defendant in believing that there was any such necessity.

Order affirmed.

MORRIS v. PLATT.

Supreme Court of Errors, Connecticut, 1864. 32 Conn. Rep., 75.

BUTLER, J. It appears from the evidence offered on the trial that the defendant wounded the plaintiff in two places by two shots fired from a pistol; and from the nature of the weapon, and the other conceded circumstances, the jury were authorized to find, and doubtless did find, that the wounds were inflicted with a design to take the life of the plaintiff. It was incumbent on the defendant

& N. E. R. Co. v. Jopes, 142 U. S. 18 (1891); *Higgins v. Minaghan*, 78 Wis. 602 (1891), p. 610; *Baker v. Gausin*, 76 Ind. 317.

In *State v. Bryson*, 2 Winston 86 (N. Car. 1864), Manly J. says, "A right to act in self-defense does not depend upon the special state of mind of the subject of inquiry. He is judged by the rules which are applicable to men whose nerves are in an ordinarily sound and healthy state; and whatever may be his personal apprehension, if he has not reasonable ground to support them, he will not be protected by the principle of self-defense. The normal condition of the human passions and faculties must be regarded in establishing rules for the government of human conduct. The question, then, in such cases as the present, is not what were the apprehensions of the defendant, but what these ought to have been, when measured by a standard derived from observation of men of ordinary firmness and reflection." But see *Patterson v. Standling*, 91 Ill. App. 671 (1900), where it was held that it was error to instruct the jury that the circumstances must be such as to induce the mind of a courageous man to believe that he must strike to defend himself, it being only required that they are sufficient to induce such a belief in the mind of a reasonably prudent man.

The fear which will justify the use of force in self-defense must be the fear of imminent danger unless the blow be struck. One is not justified in shooting on sight a person who has threatened to kill him even though he has good reason to believe that an effort will be made to carry the threat into execution at some future time, *Rippy v. State*, 2 Head 217 (Tenn. 1858); *Lander v. State*, 12 Tex. 462 (1854); but see *Bohannon v. Commonwealth*, 8 Bush 481 (Ky. 1871); and this is so though the person assaulted is at the time of the assault armed, *Hulse v. Tollman*, 49 Ill. App. 490 (1853). There must be something done by the person assaulted apparently indicating an attempt to attack the defendant, or, where there are threats, demonstrations appropriate to carry such threats into execution, *Stoneman v. Commonwealth*, 25 Gratt. 887 (Va. 1874). Threats known to the defendant, however, are important, as determining whether he is justified in believing the conduct of the person assailed was an attempt or demonstration, *State v. Evans*, 65 Mo. 574 (1877). Where there are antecedent threats or where the circumstances are such as to indicate an apparent intent on the part of the person assailed

to justify or excuse their infliction. He in the first place attempted to justify them, and the obvious attempt to take life which aggravated them, by offering evidence to prove that he was assailed by the plaintiff and others in a manner which indicated a design to take his life, and "that he was in great bodily peril and in danger of losing his life by means of the attack," and that he fired the pistol "to protect his life and his body from extreme bodily injury." If these facts were proved and found true, they fully justified the attempt of the defendant to take the life of the plaintiff as matter of law, and entitled the defendant to a verdict in his favor. And so the court were bound to tell the jury, if properly requested to do so by the defendant.

The plaintiff, in answer to the defense made, denied that he was an assailant, and claimed that he was a bystander merely, and requested the court to charge the jury, in substance, that if they so found, he was entitled to recover, although they should also find the defendant to have been lawfully defending himself against his assailants, and the injury to the plaintiff accidental. That request of the plaintiff embodies the unqualified proposition that a man lawfully exercising the right of self-defense, is liable to third persons for *any* and *all* unintentional, accidental injurious consequences which may happen to them, and the court so charged the jury. Although there are one or two old cases and some dicta which seem to sustain it, that proposition is not law.

It is well settled in this court that a man is not liable, in an action of trespass on the case, for any unintentional consequential injury resulting from a lawful act, where neither negligence nor folly can be imputed to him, and that the burden of proving the negligence or folly, where the act is lawful, is upon the plaintiff. *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124. Is the rule different in trespass, where the injury is the immediate and direct, though undesigned and accidental, result of a lawful act?

If the defendant had been in the act of firing the pistol at an assailant in lawful self-defense, and a flash of lightning had blinded him at the instant and diverted his aim, or an earthquake had shaken him and produced the same result, or if his aim was perfect but a sudden puff of wind had diverted it or the ball after it had passed from the pistol, and in either case the ball by reason of the diversion had hit the plaintiff, the accident would have been so effected in part by the uncontrollable and unexpected operations of nature as to be inevitable or absolutely unavoidable; and there is no principle or authority which would authorize a recovery by the plaintiff.

And, in the second place, if while in the act of firing the pistol lawfully at an assailant, the defendant was stricken, or the pistol

to assault the defendant, such equivocal conduct as putting the hand in the pocket, *Keep v. Quallman*, 68 Wis. 451 (1887); or upon the hip, *Courvoisier v. Raymond*, 23 Colo. 113 (1896); or a sudden onrush of a person believed to be one who had previously threatened violence, *Crabtree v. Dawson*, 119 Ky. 148 (1904), have been held sufficient to justify a reasonable belief that the defendant was in imminent danger.

seized or stricken by another assailant, so that its aim was unexpectedly and uncontrollably diverted towards the plaintiff; or if while in the act of firing with a correct aim, the assailant suddenly and unexpectedly stepped aside, and the ball passing over the spot hit the plaintiff, who till then was invisible and his presence unknown to the defendant; or if the pistol was fired in other respects with all the care which the exigencies of the case required or the circumstances permitted, the accident was what has been correctly termed "unavoidable under the circumstances," and whether the defendant should in such case be holden liable or not is the question we have in hand. For, in the third place, if the act of firing the pistol was not lawful or was an act which the defendant was not required by any necessity or duty to perform, and was attended by possible danger to third persons which required of him more than ordinary circumspection and care, as if he had been firing at a mark merely; or if the act though strictly lawful and necessary was done with wantonness, negligence or folly, then, although the wounding was unintentional and accidental, it is conceded, and undoubtedly true, that the defendant would be liable.

In this case the rule of law claimed by the plaintiff, and given by the court to the jury, authorized them to find a verdict for the plaintiff if they found the accident to belong to the second class, and to have been "unavoidable under the circumstances." We have seen that if the injury had been consequential and the form of action case, the defendant would not have been liable, and the question returns, whether he can and should be holden liable because the injury was direct and immediate and the form of action is trespass. I think not, whether the decision of the question be made upon principle or governed by authority.

We advise that a new trial be granted.

In this opinion the other judges concurred.

¹ *Accord: Paxton v. Boyer*, 67 Ill. 132 (1873). So where the defendant intentionally strikes the plaintiff believing him to be a third person from whom he has such reason to apprehend danger as to justify striking in self-defense, he is not liable for the mistake in identity so long as his belief was honest and justifiable under the circumstances, *Leavett's Case* (circa 1639) cited in *Cook's Case* Cro. Car. 538. The burden of proving that the mistake was negligent lies upon the plaintiff, *Courvoisier v. Raymond*, 23 Colo. 113 (1896), a riotous gang had broken into the defendant's house and having been expelled by him continued throwing stones, etc., at it, the plaintiff, a police officer, coming upon the scene came towards the defendant, the defendant testified that as the plaintiff approached he put his hand to his hip pocket the defendant thereupon shot him, thinking that he was one of the riotous gang: in *Crabtree v. Dawson*, 119 Ky. 148 (1904), the defendant had ejected an intoxicated man from a room in his building in which a pay dance was given, the intruder threatened to return and "clean out the whole thing," the plaintiff, who had been invited to attend a dance given by the defendant's daughter and others in an adjacent room, for that purpose came up the stairs which were dimly lighted, the defendant mistaking him for the intruder, struck him over the head with a musket, knocking him down the stairs. In the latter case the court held that the burden of proving that the mistake was negligent rested upon the plaintiff, but that the defendant was bound to exercise the highest care practicable to ascertain whether the person whom he struck was the one from whom he had reason to apprehend danger.

OGDEN v. CLAYCOMB.

Supreme Court of Illinois, 1869. 52 Ill. Rep., 365.

LAWRENCE, J. This was an action for assault and battery, in which the jury found for the defendant. The verdict was against the evidence, and there was error in the instructions for the defendant. From the first instruction the jury would understand, if the plaintiff advanced upon the defendant in a threatening manner, for the purpose of fighting, and a fight followed, the plaintiff could not recover, even though the defendant had far exceeded the just bounds of self-defense, and inflicted an inhuman beating, provided he desisted as soon as the plaintiff asked him to do so. The rule is, on the contrary, that no more violence can be used than a reasonable man would, under the circumstances, regard necessary to his defense.¹ If he strikes a blow not necessary to his defense, or after all danger is past,² or by way of revenge,³ he is guilty of an assault and battery. The third instruction tells the jury, among other things, that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used,⁴ so far as the right to maintain an action is concerned, and even if he went beyond words, and com-

¹ *Cockroft v. Smith*, 2 Salk. 642 (1705), an action of assault and battery and mayhem, Holt C. J. saying, that "for every assault he did not think it reasonable a man should be banged with a cudgel"; *Thomason v. Gray*, 82 Ala. 291 (1886). the jury may consider the relative size of the parties in determining whether the use of weapons was necessary; see *Edwards v. Leavitt*, 46 Vt. 126 (1873); *Watson v. Hastings*, 1 Pennew. 47 (Del. 1897); *Wells v. Englehart* 118 Ill. App. 217 (1905); *Tyson v. Booth*, 100 Mass. 258 (1868), defendant fired his shotgun at boys who were throwing snowballs at him; *Elliott v. Brown*, 2 Wend. 497 (N. Y. 1829).

The defendant must show that "the force used by him was appropriate in kind and suitable in degree," *Rogers v. Waite*, 44 Maine 275 (1857); *O'Leary v. Rowan*, 31 Mo. 117 (1860). "Ordinarily the question how far a party may properly go in self-defense is a question for the jury, not to be judged of too nicely, but with due regard to the infirmity of human impulses and passions," Morton J., in *Monize v. Begaso*, 190 Mass. 87 (1906), p. 89; but the defendant must have both an honest and reasonable belief that the force he employs is necessary for his defense, *Kent v. Cole*, 84 Mich. 579 (1891).

² *Hudson v. Crane*, Noy 115 (1606); *Watson v. Hastings*, 1 Pennew. 47 (Del. 1897); *Beavers v. Bowen*, 26 Ky. L. 291 (1904); *Monize v. Begaso*, 190 Mass. 87 (1906).

³ *Hetrick v. Crouch*, 141 Mich. 649 (1905); *Brouster v. Fox*, 117 Mo. App. 711 (1906); *Hanson v. Europe & N. A. R. Co.*, 62 Maine 84 (1873); *Monize v. Begaso*, 190 Mass. 87 (1906).

⁴ Mere words, no matter how abusive, cannot justify an assault, *Sorgenfrei v. Schroeder*, 75 Ill. 397 (1885); *Crosby v. Humphreys*, 59 Minn. 92 (1894); *Murray v. Boyne*, 42 Mo. 472 (1868); *Willey v. Carpenter*, 64 Vt. 212 (1892); but see *Tuckers v. Walters*, 78 Ga. 232 (1886); *Gisler v. Witzel*, 82 Ill. 322 (1876). As to whether a defendant who has provoked an assault can justify force in defending himself, see *Hulse v. Tollman*, 49 Ill. App. 490 (1893); *Thomason v. Gray*, 82 Ala. 291 (1886); *Morris Hotel Co. v. Henley*, 145 Ala. 678 (1906); but see *Beavers v. Bowen*, 26 Ky. L. 291 (1904).

mitted a technical assault, the acts of the defendant must still be limited to a reasonable self-defense.⁵ All the instructions for the defendant are pervaded to a greater or less degree by these errors, and should have been refused. The judgment must be reversed and the cause remanded.

Judgment reversed.

(b) Defense of others from wrongful violence.

— v. FAKENHAM.

Court of Common Pleas, 1470. Y. B. 9 Edw. IV, 48, pl. 4.

In trespass for battery against Fakenham, he says that the plaintiff made an assault upon one W. F., son of the said defendant, and the defendant saw this and commanded one J., his servant, to go to his son and defend him, and keep him from damage, by force of which he went to him and assaulted the said son (plaintiff), and so the wrong which the plaintiff had was of the assault which he made upon the said W. F., and in defense of him, &c. *Catesby*. This is not to the purpose; for where a man assaults me, if I beat him in my defense, I shall be excused; but if he assaults a stranger, I cannot beat him in his defense, for I have nothing to do with him, but I can part them, &c. *MOYLE and NEEDHAM, JJ.* If I see a man assaulting another, I can part them and put my hand upon him who made the assault, and hold him so that he cannot come at the other, &c.; but they said that I cannot draw my sword and beat the one who made the assault, &c.; but it is otherwise if one assaults my master, I can beat him in defense of my master, &c. *CHOKER, J.* That is true, for the servant is held and bound to the master, and so he can for his mistress, &c. But the master cannot do as much for his servant, for he is not so held to do for his servant, &c.¹ And then *Gennet* says *ut supra* that the plaintiff assaulted the said son of the defendant then being present, &c., and he commanded such an one, his servant, to go to his son and part them, and keep his son without damage, by reason whereof he went to them and parted them, and put his hand upon this plaintiff, so that he should not approach the said son, &c., which is the same battery, &c.²

⁵ See *McNatt v. McRae*, 117 Ga. 898 (1903).

¹ The right of a master to use force in defense of his servant is recognized in *Seaman v. Cuppledick*, Owen 150 (Circa 1607), on the ground that otherwise the master would lose his services, but see *Leward v. Basely*, 1 Ld. Raym. 62 (1695), where it is said in such case the master has no right to defend his servant, since he has an action *per quod servitium amisit*; and *Yelverton J.*, citing Y. B. 19 Henry VI, 60a, "A lord may justify in defense of his villein for he is his inheritance," per *Crook J.* in the same case. So in *Anon.*, Y. B. 19 Hen. VI 31, pl. 59 (1440), a husband's right to defend his wife is put on a similar ground that she is his chattel.

² The wife's right to defend her husband is recognized in *Leward v. Basely*, 1 Ld. Raym. 62 (1695). A child may defend its parents, *Beavers v. Bowen*, 26 Ky. L. 291 (1904); and *Obier v. Neal*, 1 Houston 449 (Del. 1855). In *Higgins v. Minaghan*, 78 Wis. 602 (1891), it was held that a husband and

OBIER v. NEAL.

Superior Court of the State of Delaware, 1855. 1 Houston, 449.

Action for an assault and battery. Joseph Neal assaulted Obier with a large stick, uplifted with both hands, and drawn back in a threatening manner. Obier seized a small one, which he did not raise, but held in his hand by his side, when Neal struck him a hard blow on the top of his head with his stick, and then Obier returned the blow with his stick but with less violence, on the side of Neal's head. They then dropped their sticks and closed with each other, when William Neal seized the plaintiff by the right arm, and while he thus held him, William H. Neal caught up the stick which Joseph Neal had dropped, and struck the plaintiff Obier a severe blow over the head with it. William H. Neal pleaded a justification of his assault and battery upon the plaintiff in defense of his father, Joseph Neal; and upon this evidence the counsel on both sides invoked the charge of the court as to the sufficiency of his plea of justification under the circumstances.

GILPIN, Ch. J., *charged the jury*: That to sustain the plea it must appear that the father was first assailed by the plaintiff, and was resisting his attack, when the son interfered to defend him. For if the father was the aggressor and committed the first assault, and was consequently a trespasser from the beginning of the combat, and was not himself justifiable in the assault and battery committed by him upon the plaintiff, then the plea of the son could not avail him, for he became a co-trespasser with his father, and was liable with him in the action. But if the father was not the aggressor, and a trespasser himself from the beginning of the fight, and was only repelling the attack of the plaintiff in his own defense, when the son interposed, as he might lawfully do in such a case in defense of his parent, then he would not be liable; provided he used only such force as the danger to which his father was exposed at the time rendered necessary for his defense and security. If, however, he exceeded that degree of force, even under such circumstances, he would still be liable.

Verdict for the plaintiff.¹

MORRISON v. COMMONWEALTH.

Kentucky Court of Appeals, 1903. 24 Ky. L., 2493.

HOBSON, J. So, the case comes to this: Did Morrison, when he saw Alex Dean committing an assault on his sister, and pushing

father was justified in shooting at a party who were giving a "charivari" outside his house, if he could not otherwise cause them to desist their noise and tumult which was terrifying his wife and children to an extent that affected their health and endangered their lives.

¹ *Accord: Jones v. Fortune*, 128 Ill. 518 (1889), master defending servant; *Beavers v. Bowen*, 26 Ky. L. 291 (1904), son coming to defense of his father; *Brouster v. Fox*, 117 Mo. App. 711 (1906), *semble*.

or striking her against the house, have a right to intervene between the brother and sister for his protection from a simple battery? In 1 Bishop on Criminal Law, §877, it is said: "The doctrine here is that whatever one may do for himself he may do for another. The common case, indeed, is where a father, son, brother, husband, servant, or the like, protects by the stronger arm the feebler. But a guest in a house may defend the house, or the neighbors of the occupant may assemble for its defense; and, on the whole, though distinctions have been taken and doubts expressed, the better view plainly is that one may do for another whatever the other may do for himself." The statement of the law, as applied to simple batteries and breaches of the peace, is broader than it is usually put in the authorities. Thus, in 3 Bl. Com. 3, it is said: "The defense of one's self or the mutual or reciprocal defense of such as stand in relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these, his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray." In a note to this it is added: "When a person does not stand in either of these relations, he cannot justify an interference on behalf of the party injured, but merely as an indifferent person to preserve the peace." See, to the same effect, 2 Am. & Eng. Enc. Law, p. 981; 2 Roberson, Criminal Law, §453.

When a felony is apparently about to be committed, as where there is apparent danger of loss of life by the person assailed or of great bodily harm to him, a different rule prevails, and there any third person may lawfully intervene for his protection, using such means for his defense as the person assaulted himself may lawfully use. But where the assault is not felonious, and the person intervening does not stand in any relations to the one assaulted except out of the common-law rule, then he who intervenes can act only for the preservation of the peace. He cannot come into the difficulty for the purpose of taking the place of the person assailed, and continuing the fight. This is the common-law rule, as we understand the authorities, and we cannot depart from it or extend it.

It is conceded on all hands that Morrison ran down on tiptoe to where Alex Dean and his sister were, some 90 feet away. If, when he got there, he at once stabbed Dean, in the back, as stated by the witnesses for the commonwealth, he was the aggressor. The instruction of the court, which submitted to the jury the question whether Morrison believed, or had reasonable grounds to believe, himself in danger of death or great bodily harm at the hands of Dean, when he stabbed him, was more favorable to Morrison than the law warranted, as the court did not submit to the jury the question whether Morrison was the aggressor. Morrison knew that the illicit relations between him and Ida Dean were the foundation of the animosity of Alex Dean to him. He also knew that this was the cause of the quarrel between the brother and sister. With this

knowledge he ran on tiptoe down to where they were, armed with a dirk, and if, as he says, he caught Alex Dean by the shoulder and shoved them apart, saying to him, "You can't beat her where I am," his interference was not as an indifferent person to preserve the peace, for his first act was to commit a battery on Alex Dean by taking him by the shoulder, and this was followed up by a declaration which he could not but know, under all the circumstances, would make Alex Dean regard him as an assailant. To hold that he intervened, under the evidence, as an indifferent person to preserve the peace, would be to give no real effect to the common-law rule allowing greater rights to parent and child, husband and wife, master and servant, or the like, than to other persons in cases of simple batteries or breaches of the peace. According to his own testimony, the manner of his approach, his conduct on reaching Alex Dean, and his declaration to him, under the circumstances, were not those of one bent on peace, but of one proposing to champion the woman and fight her battles for her. He was therefore the aggressor, and the court did not err in refusing to admit the proof as to the bad character of Alex Dean or his previous threats; and this evidence, if admitted, could not have been of material service to the defendant under the view of the law which we have indicated, for the jury might have inferred that when he interfered with the knowledge of the previous threats and the character of Dean he anticipated the result that ensued. The verdict of the jury finding him guilty of manslaughter, and fixing its punishment at eleven years in the penitentiary, seems to have been due to their accepting the version of the transaction as given by the witnesses for the commonwealth, and their believing that Morrison acted in sudden heat on seeing the woman assailed by her brother.

Judgment affirmed.¹

(c) Defense of one's property from wrongful intrusion.

McILVOY v. COCKRAN.

Court of Appeals of Kentucky, 1820. 2 A. K. Marsh Ky. Rep., 271.

OWSLEY, J. This is an appeal from a judgment recovered by Cockran in an action of trespass, assault and battery, brought by him against McIlvoy.

(The declaration in substance charged that the defendant assaulted and beat the plaintiff with "sticks, clubs, fists, hands and feet." The defendant pleaded, first, *son assauti demesne*; and second, that he was lawfully in possession of a certain close which he

¹The members of a party of friends (or social party) have no special right to interfere in defense of their associates different from that of third parties generally, *Brouster v. Fox*, 117 Mo. App. 711 (1906), which also holds that the right of one to intervene when he believes that another's life is in imminent danger is limited as the right to strike in defense of a father is limited in *Obier v. Neal*, 1 Houston 449 (Del. 1855).

had enclosed with a fence and that the plaintiff with force and arms and against his, the defendant's will, broke down some of the posts and rails and was attempting to break down others, when the defendant, being upon his said close, did defend his possession thereof and resisted the said attempt of the said plaintiff and in so doing did assault and beat the plaintiff, as mentioned in the declaration, so that if any injury happened to the plaintiff, it happened of his wrong and in the lawful and necessary defense of the defendant's close, posts, and rails.)¹

During the progress of the trial before the jury, and after the evidence was closed on both sides, the counsel of McIlvoy moved the court to instruct the jury, that if, from the evidence, they believed McIlvoy had supported the truth of his second plea, they ought to find for him; but the court overruled the motion, and instructed the jury that it was not every trespass that would justify so enormous a battery, and that if the jury believed, from the evidence, the plea was true, it ought to go in mitigation of damages.

The jury, after retiring from the bar to consult of their verdict, returned a verdict of \$1,000 in favor of Cockran: whereupon the counsel of McIlvoy moved the court for a new trial, on the grounds—1st, of the verdict being against evidence; and, 2d, for an error in the court's refusal to instruct as asked for by the counsel of McIlvoy, and in giving the instructions it did to the jury. The motion was, however, overruled, and judgment rendered in conformity with the verdict.

The examination of the sufficiency of the plea divides itself properly into two inquiries:—1st, As its sufficiency to bar any part of the cause of action, and if any, 2d, how much?

In responding to these inquiries, it must be borne in mind that the declaration contains a charge of *assault, battery and wounding*; and the plea alleges the injury to have been occasioned by McIlvoy (the defendant in the circuit court) in defense of a close of which he was possessed; and in resisting the attempt of Cockran *forcibly* to enter and demolish the fence thereto appertaining.

It is not denied but that an assault and battery may be justified in the defense of the possession of either real or personal property;² but it is contended that previous to the use of force there

¹ The pleadings, which are set out at length in the opinion, are much condensed.

² In *Laurences cases*, 2 Rolle. Abr. 548 (1609), it was held that "one may justify the battery of another who will enter my house, for it is my castle"; and in *Anon.*, Y. B. 21 Henry VII, 39, pl. 50 (1505), it is said by Fineux C. J., that "if a man is in his house and hears that such a one is coming to his house to beat him, he may well collect his friends and neighbors to help him in the defense of his person."

While more force may perhaps be used in defense of one's house or home, see *Anon.*, *supra*, and *Newcome v. Russell*, 133 Ky. 29 (1909), the right to resist intrusion or to eject an intruder is not confined to the protection of one's home, but may be exercised by one in possession of any real property, as by an occupant of a business office, *Morgan v. Durfee*, 69 Mo. 469 (1879); *Townsend v. Briggs*, 99 Cal. 481 (1893). So a church, which has lawfully discharged its pastor, may use the force necessary to remove him from the

should be a request to depart, and that the injury should not be justified in the mode adopted by McIlvoy, but that he ought to have pleaded by way of *moliter manus imposit*.

That *moliter manus* is the proper mode to pleading of many actions brought for injuries arising in defense of the possession of property, will not be controverted; but that it is the only admissible mode in every possible case, we apprehend, cannot be maintained.

There are certainly cases where force may be employed in defense of possession, without a previous request to depart. Thus, in the case of *Green v. Goddard*, 2 Salk. 641, the court said, in cases of *actual force*, as breaking open a gate or door, it is lawful to oppose force with force; and if one breaks down a gate, or comes into a close with force and arms, the possessor need not request him to depart, but may lay hands upon him immediately, for it is but returning violence with violence:³ so if one comes forcibly and takes away my goods, he may be opposed immediately, for there is no time to make a request: but, say the court, where one enters the close without *actual force*, although his entry will be construed a *force in law*, there must be a request to depart before the possessor can lay hands upon him and turn him out.⁴

This case from Salkeld, whilst it discriminates between those cases where force may or may not be employed without a request to depart, illustrates conclusively the cases where *moliter manus* should properly be pleaded, as well as those where such a plea as that adopted by McIlvoy may be adopted. It shows that where

pulpit if he thereafter insists on occupying it, *Conway v. Carpenter*, 80 Hun 428 (N. Y. 1894).

The right is available against one seeking to enter under claim of adverse title; *McCarty v. Fremont*, 23 Cal. 196 (1863); *Drew v. Comstock*, 57 Mich. 176 (1885); *O'Donnell v. McIntyre*, 118 N. Y. 156 (1890), or who seeks to enter without the owner's consent to get his goods which are on the premises, *Newkirk v. Sabler*, 9 Barb. 652 (N. Y. 1850).

The right to use force in defense of the lawful possession of chattels was recognized in an Anonymous case, Y. B., 19 Henry VI, 31, pl. 59 (1440), though Fortescue, as counsel for the plaintiff, argued that the defendant had a sufficient remedy in the action of trespass *de bonis asportatis*; and Anon., Y. B., 9 Edw. IV, 28, pl. 42 (1469).

³ So, when after notice not to come upon the defendant's premises, the plaintiff springs on the land in a threatening manner, the defendant may lawfully resist the intrusion, using no unnecessary force, *Harrison v. Harrison*, 43 Vt. 417 (1871).

⁴ *Tullay v. Reed*, 1 C. & P. 6 (1823); *State v. Elliott*, 11 N. H. 540 (1841), *semble*; *Scribner v. Beach*, 4 Denio 448 (N. Y. 1847); *Ayers v. Birtch*, 35 Mich. 501 (1877). So it is held in *Thompson v. Berry*, 1 Cranch. C. C. 45 (U. S. C. C. 1801), to be a battery to push a trespasser from one's land without first requesting him to leave, and a mere antecedent notice not to trespass will not dispense with the necessity of endeavoring by peaceful means to prevent the trespass before resorting to force, *Howell v. Hopkins*, 8 Ky. L. 527 (1886), compare *Harrison v. Harrison*, 43 Vt. 417 (1871).

So in defense of chattels, *Scribner v. Beach*, 4 Denio 448 (N. Y. 1847), and see Anon., Y. B., 9 Edw. IV, 28, pl. 42 (1469), "If a man will take my goods I may lay hands on him and prevent him, and if he will not desist, I may beat him, rather than let him carry them off."

So one who has entered upon a revocable license, if he insist upon remaining after the license is revoked and he is requested to leave, becomes

possession has been invaded by *implied force* only, injuries in defense of the possession ought to be justified by way of *moliter manus*; but where the possession is attacked by *actual force*, as no request to desist is necessary, the injury may be justified by pleading the facts which authorize the employment of force in defense of the possession.

We are aware that, in some reported cases, judges are said to have used expressions negating the idea of any justification in defense of possession, other than by a plea of *moliter manus*; but in using those expressions, we apprehend, the court must have had in view injuries resulting in the defense of possession invaded, not by actual, but by constructive force.

It was upon this distinction between *actual* and *constructive* force, and this only, and by applying the plea of *moliter manus* to the latter, and not the former, that the reported cases can be reconciled with each other; and, understanding the court, when speaking on the subject of that plea, to have had in mind the cases of constructive force, there is no difficulty in reconciling the authorities.

But whilst each plea is admissible when applied to its appropriate case, in neither mode can every species of injuries be justified, exclusively in defense of possession. Where the possession is invaded by force in law, and the intruder refuses to depart, or where it is invaded by *actual force*, *force* may be employed by the possessor; and as every forcible laying of hands upon another is, in legal contemplation, a battery, it follows that, in either mode of pleading, an assault and battery may be justified.

Notwithstanding, however, an assault and battery may be justified in either mode of pleading, we apprehend a *wounding* cannot be: for it is well settled that in defense of possession a wounding

a trespasser and may be ejected as such, *Woodman v. Howell*, 45 Ill. 367 (1867); *Townsend v. Briggs*, 99 Cal. 481 (1893).

So one who has by his misconduct forfeited his right to be on the premises may, if he refuse to leave, be forcibly removed, as where one disturbs a meeting, religious, political, social or sporting, *Wall v. Lee*, 34 N. Y. 141 (1865), and cases cited therein; or where a scholar in a public school is turbulent and refractory, *Peck v. Smith*, 41 Conn. 442 (1874); and see *Smith v. Slocum*, 62 Ill. 354 (1872). Nor is the motive of the defendant in excluding the plaintiff from his premises or in revoking his license material, *Slingerland v. Gillispie*, 70 N. J. L. 720 (1904); *Townsend v. Briggs*, 99 Cal. 481 (1893); *Brothers v. Morris*, 49 Vt. 460 (1877).

If the intruder refuse to leave when requested to do so, the owner may turn him out, using no unnecessary force, *Weaver v. Bush*, 8 T. R. 78 (1798); *McDermott v. Kennedy*, 1 Harr. 143 (Del. 1883); *Lichtenwallner v. Laubach*, 105 Pa. St. 366 (1884); *Commonwealth v. Clark*, 2 Metc. 23 (Mass. 1840); *Coleman v. New York & C. R. Co.*, 106 Mass. 160 (1870); *Drew v. Comstock*, 57 Mich. 176 (1885); *Watrous v. Steel*, 4 Vt. 629 (1829), and the intruder has no right to resist expulsion so that sufficient force may be used to overcome his violent resistance thereto, *Coleman v. New York & C. R. Co.*, 106 Mass. 160 (1870). The owner is liable if he uses excessive force to eject a trespasser, *Coleman v. New York & C. R. Co.*, 106 Mass. 160 (1870); *Hunt v. Caskey*, 60 Atl. 42 (N. J. 1905); *Breback v. Johnson*, 62 Ill. App. 131 (1895); *Weaver v. Bush*, 8 T. R. 78 (1798), in which it is said that in such case the plaintiff should new assign, but see to the effect that no new assignment is necessary, *Simpson v. Morris*, 4 Taunton, 821 (1813).

cannot be justified. Com. Dig., title, Pleader, 3 m, 16, 17.⁵ But although a wounding cannot be justified barely in defense of possession, yet if, in attempting to remove the intruder, or prevent his forcible entry, he should commit an assault upon the person of the possessor, or his family, and the owner should, in defense of himself or family, wound him, the wounding may, no doubt, be justified;⁶ but then, as the *personal assault* would form the grounds of justification, the plea should set out, specifically, the *assault* in justification.

From what has been said, it will be perceived that the plea of McIlvoy, as it contains allegations of actual force on the part of Cockran, imports a defense to the assault and battery charged in the declaration;⁷ but as it contains no allegation of a personal assault by Cockran, it furnishes no justification to the wounding stated in the declaration. It results, therefore, that if the plea was proven to be true, the jury, sworn to try also on other issues going to the whole cause of action, could not regularly have found a general verdict for McIlvoy, and, consequently, the court properly refused the instructions to the jury asked by McIlvoy.

The only remaining question necessary to be noticed involves an inquiry into the decision of the court in refusing a new trial.

It will be recollected the motion was made on the grounds of the verdict being against evidence, and on the grounds of the court having erred in their instruction to the jury.

From what has already been observed, it will be perceived that there is no error in the decision of the court upon the motion to instruct. And with respect to the evidence it need only be remarked, that it appears to have been of a character peculiarly proper for the decision of the jury, and not such as will justify the interposition of this court.

The judgment must be affirmed, with cost and damages.⁸

⁵ *Accord*: Wounding in defense of possession of land: *Gregory v. Hill*, 8 T. R. 299 (1799); *Everton v. Estgate*, 24 Nebr. 235 (1888); and *Newcome v. Russell*, 133 Ky. 29 (1909), in which it is intimated that even wounding may be justified if necessary for the defense of one's home.

Wounding in defense of possession of chattels: *Scribner v. Beach*, 4 Denio 448 (N. Y. 1847); *Gates v. Lounsbury*, 20 Johns. 427 (N. Y. 1823).

Nor can the use of dangerous weapons be justified, *Hinchcliffe's case*, 1 Lew. 161 (1823); *Everton v. Estgate*, 24 Nebr. 235 (1888); nor the throwing of stones or other missiles which, after they leave the thrower's hand, can not be guided, *Cole v. Mamider*, 2 Rolle. Abr. 548 (1635); but see *Talmage v. Smith*, 101 Mich. 370 (1883), where it was held that while an owner of property was not justified in throwing a stick at boys trespassing in his shed intending to hit them, he was justified in throwing it at them intending only to frighten them, though in fact one of the boys was struck.

Nor can the use of force be justified unless it is appropriate to rid the land of the intruder, so to throw down a ladder upon which a trespasser was standing held not to be justified since "it only left him on the ground at the foot of the ladder, instead of being upon it," *Collins v. Renison*, Sayer 138 (1754).

⁶ See *Robinson v. Hawkins*, 4 T. B. Mon. 134 (Ky. 1826); *Fossbinder v. Svitak*, 16 Nebr. 499 (1884).

⁷ See *Weaver v. Bush*, 8 T. R. 78 (1798).

⁸ An occupier of land is not bound to impound trespassing cattle or in-

LIPE v. BLACKWELDER.

Appellate Courts of Illinois, 1886. 25 Ill. App. Rep., 119.

CONGER, P. J. This was an action originally brought by appellant against appellee before a justice of the peace, for injuries inflicted by appellee upon appellant's dog. A trial was had before a jury, resulting in a verdict and judgment for appellee. Upon appeal to the circuit court and trial before a jury, the result was the same.

The parties to the suit are farmers, residing about one mile apart. Appellant is the owner of seven or eight hounds which he keeps for hunting purposes. At the time of the alleged injury about twenty acres of appellee's land was in growing wheat, the land having been rented by appellee to one Nussman. It was claimed by appellee, and some evidence was offered tending to support such claim, that in the early spring and during the time the wheat was maturing, the dogs of appellant were in the habit of running through this wheat, chasing rabbits and other game, until they had trampled down and destroyed eighteen or twenty bushels of the growing wheat, and had several times prior to the shooting been driven out with clubs.

animate chattels wrongfully placed or allowed to remain upon his premises, or coming accidentally thereon, but he may drive out the cattle, *Tyringham's case*, 4 Coke 36 b (1583), even into the highway, and this without liability for their subsequent straying, *Cory v. Little*, 6 N. H. 213 (1813), or remove them to the other's premises, *Grier v. Ward*, 23 Ga. 145 (1857); *Knapp v. Hortung*, 103 Pa. St. 400 (1893); *Ryan v. State*, 5 Ind. App. 396 (1894), using reasonable care to do no unnecessary harm. So when the plaintiff has hitched his horse to a shade tree, the owner of the tree, who, to prevent the horse from gnawing it, as horses are notoriously prone to do, may unhitch it and remove it and re hitch it to a nearby hitching post, is not liable in trespass *de bonis asportatis*, though he would be liable in case if he had not used reasonable care in rehitching it, *Gilman v. Emery*, 54 Maine 460 (1867).

He may not set ferocious dogs upon trespassing cattle, *Amick v. O'Hara*, 6 Black 253 (Ind. 1842), but unless the circumstances make it unduly dangerous, *McIntire v. Plaisted*, 57 N. H. 606 (1876), he may drive them out with ordinary farm dogs, *Mitten v. Faudrye*, Popham, 161 (1624); *Wood v. LaRue*, 9 Mich. 158 (1881); *Davis v. Campbell*, 23 Vt. 236 (1851).

In removing inanimate chattels the occupier of the land should remove them to some adjacent place for the owner's use, *Crane v. Mason*, Wright 333 (Ohio 1853), and may not destroy them or expose them to unnecessary risk of injury, *Grier v. Ward*, 23 Ga. 145 (1857), though if the chattels are on his premises by their owner's wrong, he may regard his own interest and convenience rather than the chattels and need put himself to less trouble and expense to preserve them, *Almy v. Grinnell*, 12 Metc. 53 (Mass. 1846); with which compare *Grier v. Ward*, *ante*. Where the goods come on the land accidentally or are otherwise thereon without their owner's fault, they must be removed with the least possible injury to them and inconvenience to their owner, *Berry v. Carle*, 3 Greenl. 269 (Maine, 1825), and *Fosdick v. Collins*, 1 Stark. 138 (1816); the latter case holding that the plaintiff's goods having been left on the land by the consent of the vendor of the defendant, and he on taking possession having refused to allow the plaintiff to remove them, he could not justify removing them himself to a distance.

The circumstances of the shooting are thus detailed by the appellee in his testimony:

"Last June I shot one of plaintiff's hounds while he was running through my wheat; plaintiff's hounds had been accustomed to run in said field all season, and were damaging it by knocking it down. Mr. Nussman, my tenant, told me I must keep the dogs out of the wheat (to which last statement defendant objected and excepted). I saw them in there several times, and heard them at other times; I never saw more than three or four hounds in there at any one time, and generally only saw two. There were eighteen or twenty acres of wheat in the piece. I heard a couple of hounds in the wheat and took my gun, loaded with No. 6 shot, and went into the wheat, and when the dogs came within about forty yards of me I shot one of them, a black and white fellow. I shot the dog when he was coming straight toward me, because he was in the wheat field and I could not keep them out any other way. The dogs had knocked down enough wheat to make twenty bushels of wheat; they were running rabbits in the wheat, and made roads in it."

The court, at the instance of appellee, gave the jury the following instructions:

"The court instructs the jury that the defendant had the right to use such means as were necessary for the purpose of putting the dogs out of his field, and if in so doing it resulted in the mutilation of the animal in question it would not be a violation of law, and if the jury believe, from the evidence, that the defendant used such means as a reasonable man would use, all the circumstances considered, to exclude the dogs from his field and his wheat, and did no more harm to the dog than was necessary, under all the circumstances proved in the case, then the jury will find for the defendant." It is insisted that these instructions are erroneous; that however appropriate they might be, where one was defending his *animate* property from destruction, they are the law as applied to the protection of *inanimate* property.

Counsel state the proposition in the following words: "Appellee had not the right to exercise the same force to protect his wheat field, inanimate property, which he might have been justified in using had appellant's dog been found worrying and seemingly about to destroy a valuable domestic animal, animate property, belonging to him."

We fail to see the propriety of the distinction made by counsel.¹

Every man has a right to defend and protect his property of every kind and character from injury or destruction, provided he

¹ Compare also, *Ford v. Taggart*, 4 Tex. 492 (1849); *Champion v. Vincent*, 20 Tex. 811 (1858), and Ames, J., in *Clark v. Keliher*, 107 Mass. 406 (1871), to the effect that neither mules, hogs, cattle or other "animals reclaimed and used for burden, husbandry or food" can be killed when found trespassing, even to preserve the crops from destruction, with *Williams v. Dixon*, 65 N. Car. 416 (1871), where it was held that the defendant might kill an ass which had thrown down his cow and was stamping on it; and see *Canefox v. Crenshaw*, 24 Mo. 199 (1857); and *Anderson v. Smith*, 7 Ill. App. 354 (1880), p. 359.

uses only such means as are reasonably necessary under the circumstances. And the reasonableness or unreasonableness of the means used is always a question of fact for the jury.

Thus, in *Kline v. Kline*, 6 Pa. St. 318, when a dog was killed in the act of getting fish down from the wall where they had been hung to dry, the court say: "And his property, whether meat or fish, in his cellar, in his kitchen or in his yard, it was lawful for him to preserve against any man's dog; and if he could not otherwise protect it, he might kill the dog when caught on his premises in the act of destruction. Whether he could not preserve his property and the customary use of it without destroying the animal committing depredations, when found in the act, ought to have been submitted to the jury by the court, as a question within their province to decide."

In the case at bar appellee had a right to protect his wheat from trespassing dogs, and if, in the opinion of the jury, it could not be done by any reasonable means except by those used by appellee,³ and that such means were, under the circumstances reasonable and proper, he would not be liable to appellant for the injury resulting therefrom.

In determining the question of the reasonableness of resorting to such extreme measure to protect property, the value of the animal doing the mischief, the disturbance and mischief likely to be wrought,⁴ the probability of less severe measures being successful and the necessity for immediate action, are all elements to be considered in reaching a conclusion.⁴

³ *Accord: Anderson v. Smith*, 7 Ill. App. 354 (1880); *Nesbett v. Wilbur*, 177 Mass. 200 (1900); and see *Canefox v. Crenshaw*, 24 Mo. 199 (1857), *semble*. In *Simmonds v. Holmes*, 61 Conn. 1 (1891), in which the relative value of the animal killed and the property threatened or attacked by it was held to be immaterial, the defendant justified under a statute giving him the absolute right to kill animals running at large and injuring or threatening injury to property.

⁴ Compare the language of Holmes, C. J., in *Nesbett v. Wilbur*, 177 Mass. 200 (1900).

⁵ In the following cases the dog being in the very act of attacking, injuring or consuming the defendant's property, his killing was held justifiable; *King v. Kline* (6 Pa. St. 318), cited in the principal case; *Leonard v. Wilkins*, 9 Johns. 233 (N. Y. 1812), the dog had one of the defendant's fowls in his mouth and was running away with it when shot; *Canefox v. Crenshaw*, 24 Mo. 199 (1875), buffalo bull shot in the act of destroying the defendant's property and polluting his herd of cattle; *Williams v. Dixon*, 65 N. Car. 416 (1871).

In *Wright v. Ramscot*, 1 Saunders 84 (1678), a plea setting forth that the defendant stabbed and killed the plaintiff's mastiff because it was attacking the dog of the defendant's mistress, was bad, it not alleging that he could not otherwise separate them; *accord: Hinckley v. Emerson*, 4 Cowen 351 (N. Y. 1825), dog making slight and more or less playful attacks on defendant's hogs, the attack was over and the dog under its master's charge when killed—but see *Boecher v. Lutz*, 13 Daly 28 (N. Y. 1885)—; and in *Livermore v. Batchelder*, 141 Mass. 179 (1886), it was held that a finding that the defendant had reasonable cause to believe that the dog was about to attack and kill his chickens did not justify killing the dog, in the absence of a finding that he had reasonable cause to believe that it was necessary to kill the dog to keep him from killing the chickens; compare *Nesbett v. Wilbur*,

As was said in *Anderson v. Smith*, 7 Ill. App. 359, "There must be an apparent necessity for the defense, honestly believed to be real, and then the acts of defense must in themselves be reasonable. Acts beyond reason are excessive. The consequences of the proposed act to the aggressor should be considered in connection with the consequences of non-action to the party defending, whether the defense be made in favor of person or property."

We think the instructions fairly submitted the law to the jury. Appellant's third instruction, which told the jury that if appellee shot the dog for no other reason than that the dog *had been accustomed* to run through his wheat, they should find for appellant, announced a correct principle of law, and had the evidence justified it, should have been given.

But the evidence was undisputed that the dog was at the time of being shot trespassing upon the wheat, and appellee's uncontradicted statement being that he shot "because he was in the wheat-field and he could not keep him out any other way," it can hardly be presumed that the jury would indulge the presumption that appellee shot the dog, for the reason given in the instruction.

If the refusing of the instruction was error, we do not think it worked any injury to appellant. Neither do we think the remarks of the court in passing upon the evidence prejudiced the appellant.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.⁵

177 Mass. 200 (1900); and see *Ulery v. Jones*, 81 Ill. 403 (1876); and *Cane-fox v. Crenshaw*, 24 Mo. 199 (1857); *contra*, *Parrott v. Hartsfield*, 4 Dev. & Bat. 110 (N. Car. 1838), which makes a curious distinction between the killing of dogs for the protection of animals in a wild state, and killing of dogs for the protection of sheep, cattle and other domesticated and useful animals. But compare *Ten Hopen v. Walker*, 96 Mich. 236 (1893), where it was held that a dog could not be shot even if about to destroy the defendant's plants, "because the law affords a remedy for the destruction of property caused by the beasts of another," with *Throne v. Mead*, 122 Mich. 273 (1899); and *McChesney v. Wilson*, 132 Mich. 252 (1903), and see Ames J. in *Clark v. Keliher*, 107 Mass. 406 (1871).

In the following cases the killing was held unjustifiable, the animal not being caught in the act, *Janson v. Brown*, 1 Camp. 41 (1807), the dog having dropped the fowl an instant before he was shot; *Wells v. Head*, 4 C. & P. 568 (1831), dog had left the field where he had worried defendant's sheep; *Vere v. Lord Cawdor*, 11 East 568 (1809), dog shot chasing game; but compare *Protheroe v. Mathews*, 5 C. & P. 581 (1833); *Barrington v. Turner*, 3 Lev. 28 (1697); *Wadhurst v. Damme*, Cro. Jac. 45 (1604), where the dog was chasing game in a "park" or "warren"; and *Deane v. Clayton*, 7 Taunton 489 (1817); and see *Johnson v. Patterson*, 14 Conn. 1 (1840); *Sosat v. State*, 2 Ind. App. 586 (1891); and *Williams v. Dixon*, 65 N. Car. 416 (1871).

⁵ Accord: *McChesney v. Wilson*, 132 Mich. 252 (1903); *Marshall v. Blackshire*, 44 Iowa 475 (1876).

An animal, whether cattle, dogs or fowl, cannot be killed merely because it is trespassing and cannot be kept out in any other way, *Conner v. Champneys*, Taunton Assizes 1814, cited in argument of *Deane v. Clayton*, 2 Marshall (C. P.) 684; *Ten Hopen v. Walker*, 96 Mich. 236 (1893); *Clark v. Keliher*, 107 Mass. 406 (1871); *Mathews v. Fiestal*, 2 E. D. Smith, 90 (N. Y. 1853), even though its conduct while upon the land is highly annoying; *Bowers v. Horan*, 93 Mich. 420 (1899); or is in company with other dogs which had previously worried cattle, *Barret v. Utley*, 12 Bush 399 (Ky. 1896); nor can

ALDRICH v. WRIGHT.

In the Supreme Judicial Court of New Hampshire, 1873. 53 N. H., 398.

Debt, by Arthur R. Aldrich against Wells Wright, to recover the penalties prescribed by Sec. 2, Chap. 251, General Statutes, for killing minks. The defendant admitted the killing of four minks, but alleged, in justification, that the animals were at the time pursuing his geese.

The only evidence in the case was the testimony of George W. Blood, who, in common with the defendant, owned a small goose-pond. The dividing line between the premises of the witness and the defendant was the brook running into this pond; and the houses occupied by the witness and the defendant were on the opposite sides of the brook, and but a few rods distant therefrom. The witness testified as follows: "I stood in my dooryard; heard the geese cackling; I came out on to a little knoll; I saw the four minks swimming towards the geese; some of the geese had then got on to the shore of the pond and some of them were in the water; the minks were from one to three rods distant from the geese; some of the geese within a rod of the minks, who were one old mink and three young ones, but all about the same size. As soon as the minks saw me they stopped pursuing the geese, and ran out upon a little island and there stopped. At the same time I came out the defendant also came out with his gun; he came out near the end of the causeway that is laid across the lower end of the pond, and fired at the minks on the island, killing them all at one shot, the minks were all on the island when he fired; the defendant carried the minks off to his house; the geese were six old ones, and eight young ones about half grown; geese had run in the pond two or three summers; never knew of any mink chasing any geese there before or since; don't know whether minks are accustomed to kill geese or not."

A verdict was taken for the plaintiff by consent, subject to the defendant's exception to a *pro forma* ruling that the defendant would not be justified in killing the minks if the geese were not in imminent danger, and could have been protected either by driving away the geese, or frightening or driving off the minks.

Ray, Drew and Heywood, for the defendant.

G. A. Bingham and Aldrich, for the plaintiff.

poison be put out to kill trespassing dogs, 53 Mo. App. 517 (1893); and see *Townsend v. Walthen*, 9 East. 277 (1808). But if dogs habitually assemble on the defendant's premises and by their fighting and howling make sleep impossible in his house and so become a nuisance, he may, after notice to their owners to restrain them, shoot them if he cannot otherwise keep them away, *Brill v. Flagler*, 23 Wend. 354 (N. Y. 1840); *Hubbard v. Preston*, 90 Mich. 221 (1892), though a dog may not be killed, merely because it has the habit of barking at vehicles in the street, *Jacquay v. Hartsell*, 1 Ind. App. 500 (1891).

Contra: Ten Hopen v. Walker, 96 Mich. 236 (1893), *semble*, in which, as in *Brent v. Kimball*, 60 Ill. 211 (1871), the right to kill a trespassing dog was said to be restricted to the statutory rights to kill a dog worrying or chasing sheep or when it is mad, or has been recently bitten by a mad dog, or

DOE, J. In this case the question is, not of the real danger merely, but also of the danger, on reasonable grounds, really believed by the defendant to exist.

The reputation of the minks, their pursuit of the geese, and the alarm and retreat of the latter, may have shown apparent danger, when the real character of the pursuers may have created no actual danger. Mr. Blood, a near neighbor of the defendant, did not know whether minks are accustomed to kill geese or not. The defendant may have been equally uninstructed. And it was not his duty to postpone the defense of his property until, neglecting his usual occupations and incurring expense, he could examine zoological authorities, consult experts, or take the opinion of the county, on the question whether his "half-grown" geese were actually endangered, in life or limb, by the incursion of "one old mink and three young ones," "all about the same size." The conclusion of the investigation might be too late. And if the question were found to be a debatable and doubtful one, it would not be his duty to settle it by trial at his own risk. The plaintiff's doctrine destroys the right of defense which exists in a case of merely apparent danger.

The plaintiff's claim that the defendant is liable if the geese were not in imminent danger, taken in the sense for which the plaintiff contends, and the sense in which both parties, at the trial, probably understood it, cannot be sustained.

The term "imminent" does not describe the proximity of the danger by any rule of mechanical measurement; and, in its broad and popular signification, admitting a large degree of latitude and adaptation to circumstances, it may be properly used in this case. But it has been so much used in cases of defense against a human aggressor, and, in that class of cases, has, for peculiar reasons, acquired a legal meaning so special, restricted, and technical, that, if used in a case like the present, it should be accompanied by some explanation of the general comparative and relative sense in which it is used.

It is probable that the parties understood that, by the doctrine of imminent danger, the defendant was liable unless the geese would, in a few moments, have been killed by the minks but for the defendant's shot. The doctrine, asserted in that form, would be erroneous. It was for the jury to say, considering the defendant's valuable property in the geese, the absence of absolute property in the minks, their character, whether harmless or dangerous, the probability of their renewing their pursuit if he had gone about his usual business and left the geese to their fate, the sufficiency and practicability of other kinds of defense,—considering all the material elements of the question, it was for the jury to say whether the danger was so imminent as to make the defendant's shot reasonably necessary in point of time. If, but for the shot, some of the geese, continuing to resort as usual to the pond, apparently would have been killed by these minks, within a period quite in-

is ferocious and attacks persons, but see the criticism of this case in *Anderson v. Smith*, 7 Ill App. 354 (1880).

definite, and if other precautionary measures of a reasonable kind, as measured by consequences, would have been ineffectual, the danger was imminent enough to justify the destruction of the minks for the protection of property.

Neither was there a remedy in guarding the fowls day and night. The profit accruing from six old geese and eight young ones would not pay the expense of constant convoy. His property might as well be consumed by the minks as by the cost of a guard. But, however small the value of the property, he had a right to protect it by means reasonably necessary; reasonable necessity included a consideration of economy; and eternal vigilance, as the price of success in his limited anserine business, was not reasonable. According to the precedent of charging the watch to bid any one stand, and, if he will not stand, to let him go, the defendant should have been thankful if the minks, when challenged, had gone off; but their halt at the island showed no inclination to go any considerable distance. What practicable method was there of protecting the geese in the peaceful possession and enjoyment of the pond? Without a resort to firearms, his situation would seem to have been full of embarrassment. The invasion of his premises was annoying; the legal perplexities, with which it is now claimed he was environed, had they been understood by him at the time, would have been distressing.

If (as the jury would probably find the fact to be) it apparently was reasonably necessary for him to kill the minks in order to prevent their doing mischief to his property, the authorities do not show that he transcended the right of defense.

The claim that the defendant was liable if the geese could have been protected by driving them away from the minks, cannot be sustained.

Requiring the defendant to drive away the minks if he could, is an admission that he had a right to drive them away, and that they had no right to remain on his premises without his consent. But requiring him, if he could not drive them away from the geese, to drive the geese away from them, is a practical denial of his right to keep geese in his own pond or on his own land, if he could only keep them there by killing minks. It amounts to this: it being impracticable to permanently eject the assailants, he must banish the assailed; and, the raising of geese being impossible, the raising of minks is compulsory. A freeholder, permitted to fire blank cartridges only to cover the endless retreat of his poultry before these marauders, and obliged to suffer such an enemy to ravage his lands and waters with boldness generated by impunity, is a result of turning the fact of the reasonable necessity of retreating to the wall before a human assailant into a universal rule of law. This rule practically compels the defendant to bring his poultry to the block prematurely, and to abandon an important branch of agricultural industry. His right of protecting his fowls is merely his right of exterminating them.

To hold, in this case, that the geese should have been driven

away from their home, would be equivalent to holding that they should have been killed. The doctrine of retreat would leave them a right to nothing but life in some place inaccessible to minks, where life might be unremunerative and burdensome. But that doctrine being irrelevant when the aggressor is not shielded by the inviolability of the human form and the sacred quality of human life, the geese were not bound to retreat. As against the minks, they had a right, not only to live, but to live where the defendant chose, on his soil and pond, and to enjoy such food, drink, and sanitary privileges as they found there, unmolested by these vermin, in a state of tranquillity conducive to their profitable nurture. And it was for the jury to say, not whether he could have driven them away from the minks, but whether his shot was reasonably necessary for the protection of his property, considering what adequate and economical means of permanent protection were available, the legal valuation of vermin life, and the disturbance of mischief likely to be wrought upon his real and personal estate if any other than a sanguinary defense were adopted.

Verdict set aside.¹

(d) **Intrusion upon or destruction of property required by individual or public necessity.**

Rede, C. J. in Anon., Y. B. 21 Hen. VII, 27 Pl. 5 (1506).

When my cattle are damage feasant in another's land, I cannot enter to drive them out,¹ and still it is a good deed to drive them out, lest they do more damage. But it is otherwise when a stranger drives my horse into another's close, where it does dam-

¹ *Accord: Marshall v. Blackshire*, 44 Iowa 475 (1876), the dog had chased the defendant's chickens and driven them from their feed and, on being driven away, had returned, whereupon the defendant shot him, it was held not to be error to charge that it was not necessary in order to justify the defendant in killing the dog that the dog should have been, at the instant of the shooting in the act of worrying and killing the defendant's chickens, if, when killed, his conduct was such as to create in the defendant's mind a reasonable apprehension of continued and renewed worrying and killing; *Dunning v. Bird*, 24 Ill. App. 270 (1887), defendant shot the dog, not knowing who owned it, as it was coming out of his smoke house; and see *Boecher v. Lutz*, 13 Daly 28 (N. Y. 1885).

In *Parrott v. Hartsfield*, 4 Dev. & Bat. 110 (N. Car. 1838), it is held that "a sheep stealing dog found lurking about or roaming over a man's land where sheep are kept, incurs the penalty of death" and may be shot on sight; and see *Throne v. Mead*, 122 Mich. 273 (1899), in which it is held that such a killing is justifiable though not strictly within the statute giving the right to kill dogs found chasing sheep; and *Miller v. State*, 5 Ga. App. 463 (1908), where it was held that a sheep killing dog might be killed even upon its owner's premises by the son of one whose sheep it had killed.

Contra: Johnson v. Patterson, 14 Conn. 1 (1840), defendant scattered poisoned meat about to kill the plaintiff's chickens which had habitually trespassed upon the defendant's premises and destroyed his seeds thereon.

¹ For, says Kingsmill, J., in the same case, "I ought first to tender amends."

See *Goff v. Kitts*, 15 Wend. 550 (N. Y. 1836), where it was held that the

age; in such case I may justify an entry to drive it out, since the damage done was the fault of another.

Choke, C. J., in Anon., Y. B. 6 Edw. IV, 7, Pl. 18.

If the thorns of a great tree had fallen on his land by the force of the wind, in this case he might come in to get them, because the falling was not his act but the act of the wind.¹

PLOOF v. PUTNAM.

Supreme Court of Vermont, 1908. 81 Vermont Reports, 471.

MUNSON, J. It is alleged as the ground of recovery that on the 13th day of November, 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and two minor children; that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that to save these from destruction or injury the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant by his servant unmoored the sloop, whereupon it was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children cast into the lake and upon the shore receiving injuries.

This claim is set forth in two counts: one in trespass, charging that the defendant by his servant with force and arms wilfully and designedly unmoored the sloop; the other in case, alleging that it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest, but that the defendant by his servant, in disregard of this duty, negligently, carelessly and wrongfully unmoored the sloop. Both counts are demurred to generally.

There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been

owner of a swarm of bees, which have made their hive on another's land, may not enter to reclaim them.

¹ *Accord*: Popham C. J. in *Mitten v. Faudrye*, Popham 161 (1682), "if a tree grow in a hedge and the fruit fall into another's land, the owner may fetch it in the other's land." So it was held in *Hoffman v. Armstrong*, 48 N. Y. 201 (1872), that an owner of land on which a fruit tree stands, whose branches overhang his neighbor's land, may enter the latter to take the fruit.

But if the owner cut the thorns and they fall on the adjoining land, then it is held in the principal case that he may not enter and take them.

trespasses. A reference to a few of these will be sufficient to illustrate the doctrine.

In *Miller v. Faudrye*, Poph. 161, trespass was brought for chasing sheep, and the defendant pleaded that the sheep were trespassing upon his land, and that he with a little dog chased them out, and that as soon as the sheep were off his land he called in the dog. It was argued that, although the defendant might lawfully drive the sheep from his land with a dog, and that the nature of a dog is such that he cannot be withdrawn in an instant, and that as the defendant had done his best to recall the dog trespass would not lie.

In trespass of cattle taken in A, defendant pleaded that he was seized of C, and found the cattle there damage feasant, and chased them towards the pound, and that they escaped from him and went into A, and he presently retook them; and this was held a good plea. 21 Edw. IV, 64; Vin. Ab. Trespass, H. a4 pl. 19. If one have a way over the land of another for his beasts to pass, and the beasts, being properly driven, feed the grass by morsels in passing, or run out of the way and are promptly pursued and brought back, trespass will not lie. See Vin. Ab. Trespass, K. a. pl. 1.

A traveler on a highway, who finds it obstructed from a sudden and temporary cause, may pass upon the adjoining land without becoming a trespasser, because of the necessity. *Henn's Case*, W. Jones, 296; *Campbell v. Race*, 7 Cush. 408, 54 Am. Dec. 728; *Hyde v. Jamaica*, 27 Vt. 443 (459); *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811.¹

An entry upon land to save goods which are in danger of being lost or destroyed by water or fire is not a trespass. 21 Hen. VII, 27; Vin. Abr. Trespass, H. a4, pl. 24, K. a. pl. 3.² In *Proctor v.*

¹ Aliter, when as in *Holmes v. Seeley*, 19 Wend. 507 (N. Y. 1838); and *Williams v. Safford*, 7 Barb. 309 (N. Y. 1849), the way is private, whether by grant, see *Bullard v. Harrison*, 4 M. & S. 387 (1815), or prescription, *Taylor v. Whitehead*, 2 Dougl. 745 (1781). Notwithstanding the doubt expressed by Buller J. in *Taylor v. Whitehead*, 2 Dougl. 745 (1781), and Nelson C. J. in *Holmes v. Seeley*, 19 Wend. 107 (N. Y. 1838), it was held in *Williams v. Safford*, 7 Barb. 309 (N. Y. 1849), that there is no distinction between a right of way by express grant and one of necessity, such right of way following as an incident of the grant of property to which there is no other access. When once assigned by the grantor or selected by the grantee, "it stands on the same footing as any other way by grant and both parties are bound by it, the grantor not to obstruct it, and the grantee to be confined to it."

If the owner of the land over which another has a right of way obstructs it, it is held in *Haley v. Colcord*, 59 N. H. 7 (1879), that the owner of the way may go out of the way to pass around the obstruction, *contra*, *Williams v. Safford*, 7 Barb. 309 (N. Y. 1849), holding his only remedy to be to abate the nuisance or an action of damages.

When the public have a right to use a path but subject to the right of the owner of the land to plow it, the public have no right to go *extra viam* to escape the obstruction or bad condition of the path caused by such plowing, *Arnold v. Holbrook*, L. R. 8 Q. B. 96 (1873).

² Aliter, if the goods of the landowner are imperilled by the wrongful act of the defendant, or a third person, against whom their owner might

Adams, 113 Mass. 376, 18 Am. Rep. 500, the defendant went upon the plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore and was in danger of being carried off by the sea; and it was held no trespass. See also *Dunwich v. Sterry*, 1 B. & Ad. 831.

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. 37 Hen. VII, pl. 26. One may sacrifice the personal property of another to save his life or the lives of his fellows. In *Mouse's Case*, 12 Co. 63, the defendant was sued for taking and carrying

have an action, so in *Anon.*, Y. B. 21 Hen. VII, 27, pl. 5, (1505), it was held that one who entered a field and gathered corn set apart for tithes, and carried them to the barn of the plaintiff, the person entitled to them could not justify his conduct because the tithes were in danger of destruction by cattle in the field.

The right of any citizen to enter the property of another in order to extinguish a fire, the spread of which appears reasonably probable, is recognized in *Metallic Compression Casting Co. v. Fitchburg R. R.*, 109 Mass. 277 (1873); *Hyde Park v. Gay*, 120 Mass. 589 (1876).

The right to destroy another's property to prevent the spread of fire, was held in Y. B., 9 Edw. IV, 35, (1469), to exist in a neighbor whose property was threatened when the fire was due to the owner's negligence. Such a right is recognized in all citizens to prevent the spread of fire whatever its origin, when necessary for the common good, *Maleverer v. Spinke*, Dyer 32 (1537), *Saltpeter Case*, 12 Coke, 13 (1606); *Bishop v. Mayor of Macon*, 7 Ga. 200 (1849); *Surocco v. Geary*, 3 Cal. 69 (1853); *Field v. Des Moines*, 39 Iowa 575 (1874); *McDonald v. Red Wing*, 13 Minn. 38 (1868), *semble*; *Respublica v. Sparhawk*, 1 Dall. 357 (1788), *semble*.

The right is in the citizens as individuals and not in the state under its power of eminent domain, but while it is sometimes exercised by them as such, *Conwell v. Emrie*, 2 Ind. 35 (1850), it is more usually exercised by local authorities. *Dewey v. White*, M. & M. 56 (1827); *Surocco v. Geary*, 3 Cal. 69 (1853); *Bishop v. Mayor*, 7 Ga. 200 (1849), *Field v. Des Moines*, 39 Iowa 575 (1874), *McDonald v. Red Wing*, 13 Minn. 38 (1868). Its exercise is sometimes committed by statute to the discretion of the municipal authorities; as to the effect of such statutes, see *American Printing Co. v. Lawrence*, 23 N. J. L. 9 (N. J. 1847); *Mayor v. Lord*, 17 Wend. 285, 18 Wend. 126 (N. Y. 1837), holding that they are not in exercise of the power of eminent domain, and *Hale v. Lawrence*, 1 Zab. 714 (N. J. 1848), holding that they are.

In *Bishop v. Mayor*, 7 Ga. 200 (1849), it is held that the person whose property is destroyed is by common law entitled to compensation from those whose property is thus preserved, see *Mouse's Case*, cited in principal case.

The right of destruction is not limited to the prevention of the spread of fire, it exists whenever there is a great and imminent and far-reaching danger to persons or property; so in *Dewey v. White*, M. & M. 56 (1827), firemen were held justified in tearing down ruinous chimneys, which were in danger of falling into the adjacent highway, in *Newcomb v. Tisdale*, 62 Cal. 575 (1881), it was held that a levee might be cut to prevent a general inundation, though the plaintiff's land was thereby flooded; and see *Meeker v. Van Rensselaer*, 15 Wend. 397 (N. Y. 1836), and *Fields v. Stokley*, 99 Pa. St. 306 (1882), and in *Harman v. Lynchburg*, 33 Grat. 37 (Va. 1880), it was held that the police might destroy whiskey at a time when the town was full of disbanded troops; but see *Reed v. Bias*, 8 Watts & Serg. 189 (Pa. 1844), where it was held that the tearing down of a building which excited the wrath of a mob was not a justifiable means of avoiding mob violence.

away the plaintiff's casket and its contents. It appeared that the ferryman of Gravesend took forty-seven passengers into his barge to pass to London, among whom were the plaintiff and defendant; and the barge being put upon the water a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger of being lost if certain ponderous things were not cast out, and the defendant thereupon cast out the plaintiff's casket. It was resolved that in case of necessity, to save the lives of the passengers, it was lawful for the defendant, being a passenger, to cast the plaintiff's casket out of the barge; that if the ferryman surcharge the barge the owner shall have his remedy upon the surcharge against the ferryman, but that if there be no surcharge, and the danger accrue only by the act of God, as by tempest, without fault of the ferryman, every one ought to bear his loss, to safeguard the life of man.

It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop. But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff could have moored with equal safety. The allegations are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring, but the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof and need not be alleged. It is certain that the rule suggested cannot be held applicable irrespective of circumstances, and the question must be left for adjudication upon proceedings had with reference to the evidence or the charge.

The defendant insists that the counts are defective in that they fail to show that the servant, in casting off the rope, was acting within the scope of his employment. It is said that the allegation that the island and dock were in charge of the servant does not imply authority to do an unlawful act; and that the allegations as a whole fairly indicate that the servant unmoored the sloop for a wrongful purpose of his own, and not by virtue of any general authority or special instruction received from the defendant. But we think the counts are sufficient in this respect. The allegation is that the defendant did this by his servant. The words "wilfully and designedly" in one count, and "negligently, carelessly and wrongfully" in the other, are not applied to the servant, but to the defendant acting through the servant. The necessary implication is that the servant was acting within the scope of his employment. 13 Ency. Pl. & Pr. 922; *Voegeli v. Pickel Marble, etc., Co.*, 49 Mo. App. 643; *Wabash Ry. Co. v. Savage*, 110 Ind. 156, 9 N. E. 85.

See also, *Palmer v. St. Albans*, 60 Vt. 427, 13 Atl. 569, 6 Am. St. Rep. 125.

Judgment affirmed and cause remanded.*

CHAPTER II.

Self Help.

(a) Re-entry upon real property.

NEWTON v. HARLAND.

Court of Common Pleas, 1840. 1 *Manning & Granger's Reports*, 644.

Trespass for assault and battery.

The plaintiff and his wife declare for an assault on the wife and forcing her into the street, and the defendants justify by reason of the landlord (one of the defendants) being in the lawful possession of the house and the wife of the tenant "being unlawfully therein and disturbing him in his enjoyment thereof, whereupon they gently put out the wife, who had refused when requested to depart from the same."¹

The cause was tried before Parke B. at the Summer assizes for the county of York, 1837. The facts were not very clearly ascertained at this trial, but as they ultimately appeared at the subsequent trials they were as follows: The plaintiff, A. Newton, on the 1st of September 1836, hired of the defendant Harland, for the period of six months, several rooms in a house which Harland occupied at Studley, near Ripon, in the county of York. The six months expired on the 1st of March 1837, and the rent not having been paid, Harland on the following day, and the other defendant Bailey as his assistant, distrained the goods of the plaintiff A. Newton, and Mrs. Newton having locked the doors of the rooms, and refused to give up the keys, Harland employed a blacksmith to pick the locks. In the evening of the same day Mrs. Newton was requested to quit the premises, and having refused, Harland again entered the rooms, accompanied by four or five persons, and compelled Mrs. Newton and her children and servants to leave the apartments, Harland himself laying hold of Mrs. Newton's arm, and leading her out.

Upon the facts as proved at the first trial, Parke B. told the

* In *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456 (1910), it was held that though such use of a dock might not be an actionable trespass, if no damage resulted, yet the defendant deliberately using another's property for his own protection, without the owner's permission, must answer for any damage which he does.

¹ The statement of the pleadings is taken from the second opinion of Tindal, C. J.

jury that the second plea was made out, and directed them to find the issue raised by that plea for the defendants. The jury having, in pursuance of this direction, found their verdict on the second issue for the defendants.

TINDAL, C. J. It seems to me that the cause must go down again to a new trial, in order that the facts with respect to the time and the manner of the entry by the defendants may be more precisely ascertained, and the matter placed in such a shape as will enable either party, if so advised, to obtain the judgment of a court of error upon the point.

The cause was again tried before Alderson B. at the Yorkshire Summer assizes, 1838. The facts having been given in evidence, and *Hillary v. Gay*, 6 C. & P. 284, cited on the part of the plaintiffs, the learned Baron told the jury that the question of justification was a mixed question of law and fact; that where a part of a house is let for a certain period, and the tenant refuses to quit at the expiration of the term, his license to remain ceases, and the landlord is entitled to turn him out, using no unnecessary violence. That, with respect to the second issue, the questions for the jury to consider were, whether the apartments had been hired by the plaintiff A. Newton for a certain time which had expired, and whether Mrs. Newton, on being required to quit, had refused to do so. The learned baron said that, if these facts were made out to their satisfaction, they must find for the defendants on the second issue; but lest the Court of Common Pleas should not agree in opinion with him, his lordship directed the jury to assess the damage upon that issue contingently.

The jury returned their verdict for the plaintiffs on the first issue, and for the defendants on the second, and they assessed the contingent damages at £100.

Warren, in Michaelmas term, 1837, in pursuance of leave reserved to him at the trial, moved to enter a verdict for the plaintiffs on the second issue for the damages assessed by the jury, or for a new trial on the ground of misdirection. The court refused a rule to enter a verdict for the plaintiff on the second issue for the damages contingently assessed, as the defendants had not consented to the assessment, but granted a rule for a new trial.

The court, which was composed of TINDAL, C. J., and VAUGHAN, COLTMAN and ERSKINE, JJ., took time to consider; but Mr. Justice VAUGHAN dying, and Mr. Justice COLTMAN differing in opinion from the Lord Chief Justice and Mr. Justice ERSKINE, the court desired that the case might be re-argued. It was accordingly again argued in Easter term last, before TINDAL, C. J., and BOSANQUET, COLTMAN and ERSKINE, JJ.

TINDAL, C. J. This case involves a question of great importance and one of very general application, namely, whether, after a tenancy has been determined by a notice to quit, the landlord may enter on the premises whilst the tenant still remains personally in possession, and after requesting him to depart and give up the possession, and his refusing so to do, may turn him out of possession by

force, using as much force and no more than is necessary for that purpose. Upon the pleadings in this case the plaintiff and his wife declare for an assault on the wife, and forcing her into the street; and the defendants justify by reason of the landlord being in the lawful possession of the house, and the wife of the tenant being unlawfully therein, and disturbing him in his enjoyment thereof, whereupon they gently put out the wife, who had refused, when requested, to depart from the same.

The point above stated must be necessarily determined before this case is ultimately decided. It appears, however, to me, that such question cannot, upon the present finding of the jury, be properly brought before us; but that there is a preliminary question which must be first ascertained, namely, whether, upon the facts in this case, the landlord entered upon the premises in a forcible manner, against the provisions and enactments of the statutes made against forcible entry, or, at all events, so as to render himself liable to an indictment at common law. For if the landlord, in making his entry upon the tenant, has been guilty either of a breach of a positive statute, or of an offense against the common law, it appears to me that such violation of the law in making the entry causes the possession thereby obtained to be illegal; and that the allegation in the plea that one of the defendants was lawfully in possession at the time the assault was committed, is negatived.

In the present case the defendant Harland, accompanied with five other men, entered into the apartments which had been in the plaintiff's occupation, whilst his wife still remained in possession, under circumstances which, at least, leave it as a question for the jury to determine, with proper directions from the judge at the trial of the cause, whether such entry was forcible or not. The case, indeed, was sent down by the court to a second trial for the express purpose of the jury finding this point, either in the negative or the affirmative. The point, however, has not been left to them; and I think, upon this ground, without entering into any discussion of the question to which I have above adverted, on which I forbear at present to state my opinion, that the cause should go down to another trial.

BOSANQUET, J. I agree with my Lord Chief Justice in thinking that a new trial ought to be granted in this case. Some things are clear. If a tenant hold over the land after the expiration of his term, he cannot treat the lessor who enters peaceably as a trespasser; and the lessor, in such case, may justify his own entry upon the land by virtue of his title to the possession. *Taylor v. Cole*, 3 T. R. 295; *Taunton v. Costar*, 7 T. R. 431. On the other hand, the lessor, who is out of possession, cannot maintain an action of trespass against the tenant holding over. He must first acquire a lawful possession before he can maintain such action. But if the lessor enter upon the land to take possession, he may treat as trespassers all those who afterwards come upon it; *Hey v. Moorhouse*, 6 New Cases, 52; 8 Scott 156; or who, having unlawfully taken possession, wrongfully continue upon the land, as in the case of *Butcher v.*

Butcher, 7 B. & C. 399, where the defendant had come into possession of the land by intrusion, and the rightful owner, having entered, was held entitled to maintain an action of trespass against him.

The lessor may even break and enter a house, provided it be empty, which has been occupied and held over by his tenant, though the tenant may have left some of his property therein. *Turner v. Meymott*, 1 Bing. 158. But no case has yet been decided in which the lessor has been held to be justified in expelling by force from a dwelling house a person who, having lawfully come into possession of it, has merely continued to hold possession after the expiration of his title.

The lessor who is entitled to possession may acquire such possession by lawful entry; but entry by force is not lawful. Such entry is expressly prohibited by the statute 5 Rich. II, c. 7, even where entry is given by law: "The king defendeth that none shall make entry on lands and tenements but in cases where entry is given by law; and in that case not with strong hand nor with multitude of people, but only in a peaceable and easy manner."

It was said in one case by Lord Kenyon, *Taunton v. Costar*, 7 T. R. 431, that if the party had entered and expelled the tenant by force, he might have been indicted for a forcible entry; from which it seems to have been supposed that the entry was valid, though the party entering might be indicted for it. But if the act be expressly prohibited by statute, it must, I apprehend, be illegal and void. If the lessor enter with a strong hand, his act is unlawful, and he cannot, as it seems to me, acquire lawful possession by an unlawful act.

This is an action for assault and battery. The defendant Harland justifies his act upon the ground that he was lawfully in possession; that the plaintiff Mrs. Newton was on the premises, was required to go away, and refused, whereupon he removed her in defense of his possession, using no more force than was necessary. To maintain this plea the defendants must be prepared to show that the defendant Harland had lawfully acquired possession, which, from the reason already stated, I think he had not, if force was employed to obtain it.

It is quite unnecessary to say whether, if the defendant had quietly entered and obtained possession of the house while the plaintiff's wife remained in possession of her apartment, he could have justified turning her out by force.² The passage referred to in Bacon's Abr., tit. Forcible Entry and Detainer (B), treats the force employed in turning a party out as making the original entry, though peaceable, a forcible entry within the meaning of the statute.

In the present case there was evidence tending to show that the entry of the defendant was made with a strong hand, and accompanied with such acts of violence as to bring the case within the prohibition of the statute of 5 Rich. II. But this evidence appears to have been considered by the learned judge as immaterial, for he

² See *Edwick v. Hawkes*, 18 Ch. Div. 199 (1881).

said the only questions were, whether the rooms were let for a certain term, whether the term was over, and, if so, whether the plaintiff, when required, would not go out. If that was proved, he said, the verdict in law must be for the defendant.

The direction appears to me to be incorrect, and that there ought therefore to be a new trial.

COLTMAN, J. Having the misfortune in this case to differ from the rest of the court, it is right that I should state the grounds of my opinion; but as the case will go to a new trial, and the question may be raised in a more formal way on the record, it will be sufficient to state them very briefly.

The law of England recognizes two modes of asserting the right to lands wrongfully withheld,—by entry and by action.

In the cases in which the remedy by entry was allowed, where, to use the phrase so familiarly met with in our old books, the entry is congeable, the remedy by entry was looked upon as favorably as the remedy by action. The effect of such entry is, that it gives a man seisin, or puts into immediate possession him that has right of entry on the estate, and thereby makes him complete owner; 3 Bla. Comm. 176. Agreeably to this, Mr. Justice Bayley said, in the case of *Butcher v. Butcher*, 7 B. & C. 399, "I think that a party having the right to land acquires by entry the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of the entry, wrongfully continues on the land."

I am not aware that any doubt exists, that after the entry made, he may turn any ordinary trespasser off the land; and I am unable to see any principle which should prevent him from treating his tenant at sufferance in the same way, for such a tenant is a mere wrongdoer: Co. Lit. 57b, *Pike and Hassen's case*, 3 Leon. 233, *Sir Moil Finche's case*, 2 Leon. 143.

But it is said that a person who has a right of entry ought to enter peaceably. The true doctrine on this subject is stated, as I apprehend, correctly, in the case of *Taylor v. Cole*, 3 T. R. 295, where it is said: "It is true, persons having only a right are not to assert that right by force; if any violence is used it becomes the subject of a criminal prosecution." So, in *Taunton v. Costar*, 7 T. R. 431, it is said: "If the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term."

For the preservation of the peace, the law will punish for the forcible entry; but the tenant at sufferance being himself a wrongdoer, ought not to be heard to complain in a civil action for that which is the result of his own misconduct and injustice.

The distinction between the civil rights of a person forcibly turned out of the possession of land, and the penal sanctions by which he is protected from being forcibly dispossessed, are drawn in a marked way in the cases in our old books relating to the statutes of forcible entry. Although, by those statutes, all forcible entries were prohibited, even by those who had title to enter, yet

the party dispossessed could maintain no action on the statutes. This is pointedly laid down in the Year Book, 9 H. 6, 19, 15 H. 7, 17, F. N. B. 248 H., *vide post* 669.

On these grounds I am of opinion that, although the defendant, if guilty of a forcible entry, is responsible for it in the way of a criminal prosecution, yet that as against the plaintiffs, who are wrongdoers, and altogether without title, he has obtained by his entry a lawful possession, and may justify in a civil action the removing them, in like manner as in the case of any other trespasser.*

ERSKINE, J. There are, it is true, many cases, some of which were cited at the argument, in which it has been held that no action for trespass, *quare clausum fregit*, will lie at the suit of a tenant against the landlord for a forcible entry after the expiration of the term. The earlier authorities upon this point are collected in Dalton's Justice, c. 129, p. 431, and the same doctrine is clearly established by the cases of *Taylor v. Cole*, 3 T. R. 292, *Taunton v. Cos-*

* *Accord: Pollen v. Brewer*, 7 C. B. (N. S.) 371 (1859); *Beattie v. Mair*, L. R. 10 Irish 208 (1882); *Tribble v. Frame*, 7 J. J. Marsh. 599 (Ky. 1834), *semble*; *Sampson v. Henry*, 13 Pick. 36 (Mass. 1832), though it was held that an action would lie for personal injuries inflicted during the eviction; but see *Low v. Etwell*, 121 Mass. 309 (1876); *Curtis v. Galvin*, 1 Allen 215 (Mass. 1861); *Coughlin v. Gray*, 131 Mass. 56 (1881), *semble*; *Fuhr v. Dean*, 26 Mo. 116 (1857); *Sterling v. Warden*, 51 N. H. 217 (1871); *Hyatt v. Wood*, 4 Johns. 150 (N. Y. 1809); *Overdeer v. Lewis*, 1 W. & S. 90 (Pa. 1841); and *Adams v. Adams*, 7 Phila. 160 (Pa. 1869), though this is held in *Frick v. Fiscus*, 164 Pa. St. 623 (1891), to apply only when the plaintiff is the defendant's tenant at will; *Rush v. Aiken Mfg. Co.*, 58 S. Car. 145 (1900); *Roberts v. Tarver*, 1 Lea 441 (Tenn. 1878).

Contra: Larkin v. Avery, 23 Conn. 304 (1854), *semble*; *Entelman v. Ha-good*, 95 Ga. 390 (1894); *Moore v. Boyd*, 24 Maine 242 (1844); *Emerson v. Sturgeon*, 59 Mo. 404 (1875), compare *Fuhr v. Dean*, 26 Mo. 116 (1857); *Frick v. Fiscus*, 164 Pa. St. 623 (1891), a mortgagor in possession may maintain trespass *quare clausum fregit* against a purchaser at sheriff's sale under the mortgage if the latter forcibly dispossess him; but see *Coughlin v. Gray*, 131 Mass. 56 (1881), *contra: Dustin v. Cowdry*, 23 Vt. 631 (1851); *Whittaker v. Perry*, 38 Vt. 107 (1865).

In *Reeder v. Purdy*, 41 Ill. 279 (1866), it is held that while trespass *quare clausum fregit* lies in such case, yet only nominal or punitive damages can be recovered, compensatory damages being allowed only for the attendant injury to the plaintiff's person or personal property; *accord: Dearlove v. Harrington*, 70 Ill. 251 (1873); *Mosseler v. Deaver*, 106 N. Car. 494 (1890); while in *McDonald v. Lightfoot*, Morris 450 (Iowa, 1845), it was held that the fact that the defendant had the right to enter, while no defense in trespass *quare clausum fregit*, could be shown in mitigation of the damages. So trespass *de bonis asportatis* will not lie for the loss of the wrongful possession of property, though forcibly retaken by the owner, *Mills v. Wooters*, 59 Ill. 234 (1871); *Cleveland, Cincinnati & St. L. R. Co. v. Moline Plow Co.*, 13 Ind. App. 225 (1895), nor can such a taking constitute special damage, *Beattie v. Mair*, L. R. 10 Ir. 208 (1882). If the wrongful taker has incorporated the chattel with his own from which it cannot be separated without injury thereto, the true owner may none the less retake it peaceably without liability for the necessary injury to the wrongdoer's property, *White v. Twitchell*, 25 Vt. 620 (1853), in which it was further held that the owner need not notify the wrongdoer of the retaking, though it made the structure from which it was taken unsafe for use, and was not liable for personal injury to the wrongful taker due to his using the structure in ignorance of the change in its condition, but see *Corby v. Hill*, *ante*.

tar, 7 T. R. 431, *Argent v. Durrant*, 8 T. R. 403, *Turner v. Meymott*, 1 Bingh. 158, 7 Moore, 574. But then the reason for this is also given, namely, that the plaintiff, having no title to the possession as against the landlord, can have no right of action against him as a trespasser for entering upon his own land, even with a force, for, although the law had been violated by the defendant, for which he was liable to be punished under a criminal prosecution, no right of the plaintiff had been infringed, and no injury had been sustained by him for which he could be entitled to compensation in damages.

But in the case now before the court the plaintiffs do not seek to recover damages for any supposed trespass upon their possession of the rooms; but they seek a compensation for a personal injury, and they deny that the defendant had by his entry entitled himself to treat them as trespassers.

By the 5 R. 2 stat. 1. c. 8., it is enacted, "that none from henceforth make any entry into any lands and tenements but in case when entry is given by law, and in such case with strong hand, nor with multitude of people, but only in peaceable and easy manner." It is true that the punishment of fine and imprisonment is expressly added as the statutable consequence of a violation of this prohibition. Yet, inasmuch as the act is directly prohibited, the act itself is made unlawful, even if it were not already so at common law; and it seems to me, therefore, to follow as a consequence that a landlord, under the circumstances of this case, though he has a right of entry, must, in order to reinvest himself with the lawful possession of premises held over by his tenant, exercise his right of entry peaceably; and that he cannot found a legal right to remove the tenant upon the illegal act of a forcible possession.

And this opinion is much fortified by the various provisions made by the legislature to facilitate the recovery of premises wrongfully held over by tenants after the expiration of their terms, and especially by stat. 1 G. 4, c. 87, 1 & 2 Vict. c. 74, and 56 G. 3, c. 88, for Ireland; and I cannot but apprehend that, if it were once established at law that a landlord might, in all cases where his tenant holds over, enter by force upon the premises and expel the tenant, and thereby subject himself to no greater risk than the peril of an indictment for a forcible entry, under which no restitution could be awarded, the peace of the country would be endangered by the frequent resort to their summary proceedings; and therefore, though I have entertained much doubt upon the point, I am anxious that this question should be placed in such a shape as may bring it under the consideration of all the judges, which will probably be the result of sending the case down to a new trial.

I am of opinion, therefore, for the reasons which I have already given, that the rule for a new trial should be made absolute.

Rule absolute.*

* The later English cases are *accord*, notwithstanding the *dicta* of Parke and Alderson BB. in *Harvey v. Brydges*, 14 M. & W. 437 (1845), in which they adhere to the opinions expressed by them as trial judges in *Newton v.*

(b) Recaption of personal property.

BLADES v. HIGGS.

Court of Common Pleas, 1861. 10 Common Bench Reports (N. S.), 713.

The declaration charged that the defendants assaulted and beat and pushed about the plaintiff, and took from him his goods, that is to say, dead rabbits.

The defendants pleaded, amongst other pleas,—thirdly, as to the assaulting, beating, and pushing about the plaintiff, that the plaintiff, at the said time then, &c., had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exeter; that the said rabbits were then in the possession of the plaintiff without the leave and license and against the will of the said mar-

Harland, and express disapproval of the action of the Court in Banc. In *Beddall v. Maitland*, L. R. 17 Ch. Div. 174 (1881), Fry, J., held that while an occupant of another's premises by the latter's permission, who retained possession after the permission was withdrawn, could not recover damages for his forcible eviction (his possession being unlawful), he might recover for injuries to his furniture in removing it, since such removal could only be justified by a lawful possession, which was not gained by the forcible evictor, see *accord*, *Millar v. Long*, 75 L. T. 728 (1883), where it was held that the dispossessed occupant could recover for injury done to his chattels; but see *Beattie v. Mair*, L. R. 10 Ir. 208 (1882), to the effect that he cannot recover for the asportation or injury to chattels owned by the defendant. In *Edwick v. Hawkes*, 18 Ch. Div. 199 (1881), a landlord, having a right of entry which he might have enforced by proper means, having peaceably entered the premises wrongfully held by his tenant, was held liable for an assault committed in forcibly expelling the tenant's wife therefrom, such subsequent conduct making the entry, though otherwise peaceable, a forcible entry.

These later cases, says Sir Frederick Pollock, Law of Torts, 9th Ed. 397, "makes the ingenious distinction—certainly not made by the majority (in *Newton v. Harland*)—of collateral wrongs from the forcible eviction itself"; but see *Edwick v. Hawkes*, 18 Ch. Div. 199 (1881), where the assault was the very violence which made the entry, otherwise peaceable and lawful, illegal as a forcible entry.

Where it is held that one, forcibly ousted from his wrongful possession by the owner, having the right of entry, may maintain trespass *quare clausum fregit*, see note 2, *supra*, *a fortiori*, he can recover for injuries to his person or the removal or injury to his chattels, either as aggravation of the trespass or in an action of assault and battery or trespass *de bonis asportatis*.

In some jurisdictions in which it is either held that no action of trespass *quare clausum fregit* lies, or where the point has not been decided, it is held that an action may be maintained for injuries to the person or for the removal of or injury to chattels; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597 (1886); *Hyatt v. Wood*, 4 Johns. 150 (N. Y. 1809), p. 160; *Bristol v. Burr*, 120 N. Y. 427 (1890); *Pitford v. Armstrong*, Wright 94 (Ohio, 1832); and see *Sampson v. Henry*, 13 Pick. 36 (Mass. 1832); and, for a valuable critical review for the cases upon the whole subject prior to 1870, see 2 Am. L. Rev. 429.

Though one has by irrevocable license, express or implied, the right to enter another's premises to recover his chattels or to take possession of his property situate thereon, he cannot justify an assault to overcome resistance to the immediate exercise of such license, *Churchill v. Hulbert*, 110 Mass. 42 (1872); *Drury v. Hervey*, 126 Mass. 519 (1879); *Fredericksen v. Singer Mfg. Co.*, 38 Minn. 356 (1888).

quis; and that the plaintiff was about wrongfully and unlawfully to take and carry away the said rabbits and convert the same to his own use; whereupon the defendants, as the servants of the marquis, and by his command, requested the plaintiff to refrain from carrying away and converting the same rabbits, and to quit possession thereof to the defendants as such servants, which the plaintiff refused to do; and that thereupon the defendants, as the servants of the said marquis, and by his command, gently laid their hands upon the plaintiff, and took the said rabbits from him, using no more force than necessary; which were the alleged trespasses in the declaration mentioned, &c. Demurrer and joinder.

ERLE, C. J. The declaration was in this case for an assault and battery. The substance of the justification was, that, the plaintiff having wrongfully in his possession rabbits belonging to the defendants (we consider the servants here the same as the master), and being about to carry them away, the defendants requested him to refrain, and, on his refusal, *mollitur mones imposuerunt*, and used no more force than was necessary to take the rabbits from him. To this the plaintiff has demurred, and thereby admits that he was doing the wrong, and that the defendants were maintaining the right, as alleged: and he contends they are not justified in using necessary force, on account of the danger to the public peace: but he adduces no authority to support his contention. The defendants likewise have failed to adduce any case where the justification was supported without an allegation to explain how the plaintiff took the property of the defendant and became the holder thereof.¹ But the principles of law are in our judgments decisive to show that the plea is good, although that allegation is not made.

If the defendants had actual possession of the chattels, and the plaintiff took them from them against their will, it is not disputed that the defendants might justify using the force sufficient to defend their right and retake the chattels: and we think there is no substantial distinction between that case and the present; for, if the defendants were the owners of the chattels, and entitled to possession of them, and the plaintiff wrongfully detained them from them after request, the defendants in law would have the possession,² and the plaintiff's wrongful detention against the request of the defendants would be the same violation of the right of property as the taking of the chattels out of the actual possession of the owner.

It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove a wrongdoer therefrom. In respect of land, as well as chattels, the

¹ In *Anon.*, Keilwey 92, pl. 4 (1506), the plaintiff having refused to give up a horse which he had taken from the defendant's possession (how long before does not appear) the defendant said if the plaintiff did not return it he would take it in spite of him, and taking up a staff came towards the plaintiff, this was held an assault justifiable.

² So in *Hodgeden v. Hubbard*, 18 Vt. 504 (1846), the plaintiff, who had obtained a stove by fraud, was held to have gained no lawful possession thereby.

wrongdoers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered if force was justified: see *Newton v. Harland*, 1 M. & G. 644, 1 Scott N. R. 474. But, in respect of land, that argument has been overruled in *Harvey v. Brydges*, 14 M. & W. 442. Parke, B., says: "where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though in so doing a breach of the peace was committed."

In our opinion, all that is so said of the right of property in land, applies in principle to a right of property in a chattel, and supports the present justification. If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury instead of redressing it.³

For these reasons, our judgment is for the defendants.

Judgment for the defendants.⁴

BOWMAN v. BROWN AND HALL.

Supreme Court of Vermont, 1882. 55 Vermont Reports, 184.

Trespass. The third count was for assault and battery. Plea, general issue. Trial by court, Windsor County, May Term, 1881, Taft, J., presiding. Judgment for the plaintiff.

³"If a man meets another in the highway, and by false and fraudulent misrepresentation induced that other to surrender to him the possession of his horse and carriage, and when he has so obtained possession, shows a different purpose, by word or act, to appropriate it to his own use, and to escape with it, surely it will not be held the person so deprived of property is compelled to stand with folded arms and see the fellow so escape beyond the reach of the law, or a hope of a restitution of his property, or be guilty of a violation of law in attempting to recover possession."—Turney, J., in *Anderson & Austin v. State*, 6 Baxter 608 (Tenn. 1872).

⁴*Hopkins v. Dickson*, 59 N. H. 235 (1879), the property had been wrongfully taken, how long before not stated, from the defendant's possession; *Sterling v. Warden*, 51 N. H. 217 (1871), a postmaster forcibly took possession of post-office property, wrongfully withheld by his predecessor. The right of an owner to forcibly retake his chattel, wrongfully taken or withheld from him, is stated broadly and without qualification in *Baldwin v. Hayden*, 6 Conn. 453 (1827); *Barr v. Post*, 56 Nebr. 698 (1898), *semble*; and *Winter v. Atkinson*, 92 Ill. App. 162 (1900), though there the effort to retake the goods was made immediately upon the plaintiff's refusal to give them up. In *Winter v. Atkinson*, 92 Ill. App. 162 (1900), a master was held entitled to retake by force, from a servant about to leave his employment, a book containing a list of customers, which had been entrusted to the servant for

It appeared on trial that the defendant's cow was kept in a pasture near the plaintiff's enclosure, with an arable field between the pasture and enclosure; that there was a fence between the field and pasture, but by agreement of the owners none between the field and said enclosure; that the cow escaped into this field and thence on to the plaintiff's land, where he seized her, tied her to a post and was about to drive her to the pound, when said Hall, a servant of said Brown, and by his direction, forcibly took the cow from the plaintiff; that said Brown, when he learned where his cow was, went to the plaintiff and proposed to pay for any damage that had been done by the cow; that the plaintiff said all he wanted was that the defendant should take the cow and take care of her, but said Brown did not give him to understand that he would do so, but proceeded to untie the cow, and finally directed his servant, Hall, as stated above. The testimony was conflicting; but the court found that the plaintiff did not relinquish possession of the cow, or his intent to impound her, and that he was guilty of no unreasonable delay in carrying his design to impound her into execution; and further found that the plaintiff in his attempt to retain possession of the cow was injured in his person, by reason of the acts of the defendants, and suffered damages in consequence thereof to the amount of sixty dollars.

VEAZEY, J. The recovery below was had, under the count for assault and battery, for injuries received by the plaintiff while proceeding to impound the cow of the defendant Brown and in resisting the assaults of the defendants in their efforts to rescue the cow. The defendants claimed they had the right to retake the cow and to use such force as was necessary for that purpose, for the alleged reason that under the facts found the plaintiff had no legal right to impound the cow. The plaintiff had not obtained possession wrongfully or with any fraudulent purpose. The cow was in his enclosure and he was proceeding to deal with it as he thought he had a right to do. Defendant's counsel insist that the rule is established in this state to the effect that a person who is out of possession may lawfully "fight himself" into legal possession. This rule has not been expressly adopted except in cases where the

use in his service, and which the latter refused to give up, claiming it as his own. The facts in *Barr v. Post*, 56 Nebr. 698 (1898); were similar, in both cases the right of recaption from one wrongfully holding a chattel from the rightful owner is stated generally, but see the suggestion in *Davis v. Whitridge*, 2 Strob. 232 (S. Car. 1847), that as the possession of the servant is the possession of the owner, his master, the latter has a right to forcible recaption against him, though he might not have such a right against a stranger wrongfully withholding possession; but, where the servant claims the chattel as his own, it is held in *Kirby v. Foster*, 17 R. I. 437 (1891), that the constructive possession of the master would cease and the servant's retention would be adverse and in his own right. The right of a master to retake his goods from a servant or workman to whom they have been entrusted for the purpose of the service or the work, and who wrongfully refuses to give them up upon demand, is denied in *Monson v. Lewis*, 123 Wis. 583 (1905), and in *Winter v. Beebe*, 126 Wis. 379 (1905).

owner was dispossessed by force or fraud¹ and the pursuit was fresh.² *Hodgeden v. Hubbard*, 18 Vt. 504. And such cases have been somewhat criticised but not overruled. *Dustin v. Cowdry, et al.*, 23 Vt. 631.

The judgment of the County Court is affirmed.

GYRE v. CULVER.

Supreme Court of New York, 1867. 47 Barbour's N. Y. Sup. Ct. Rep., 592.

This is an appeal by the plaintiff from an order granting a new trial. The action was for assault and battery. The defense was that the plaintiff was trespassing on the defendant's land, or land of John Culver, of which he had charge as agent for the owner, stealing wood; that he ordered her off the premises; that she re-

¹ *Accord: State v. Dooley*, 121 Mo. 591 (1891), where the pursuit was in fact fresh, the court holding that forcible recaption is permissible, though not at the precise time and place of the wrongful taking; *Shellabarger v. Morris*, 115 Mo. App. 556 (1905), here the chattel, a straying chicken, was on the plaintiff's premises, and the right to enter such premises is also involved; *Stanley v. Payne*, 78 Vt. 235 (1905), where the defendant in giving up his tenancy of a farm, agreed with his landlord that a box of his should remain in the barn during the spring, and that he might remove it thereafter. The plaintiff, who succeeded him as tenant, knew nothing of this agreement and when the defendant came to remove the box, refused to give it up till he had consulted the landlord, and, the defendant insisting on taking it, injured the plaintiff in the scuffle.

In *Kirby v. Foster*, 17 R. I. 437 (1891), the plaintiff was given money by the agent of his employer to pay off the latter's help, and acting under the advice of counsel, pocketed \$50 to repay money which he claimed had been improperly deducted from his salary, and returned the balance, saying he was now paid and would leave. The defendants, the agent and a fellow-employee, thereupon seized him and in the struggle injured him. The court held that the right of forcible recaption existed only where there was "a purely wrongful taking or conversion, without a claim of right"; and in *Sabre v. Mott*, 88 Fed. 780 (Circ. Ct. of Vt. 1898), it was held that the defendant was not justified in using force, much less in committing an assault, to retake property which had been in the plaintiff's peaceable possession for a day and "the title being in dispute." In many cases, however, forcible recaption has been allowed though the property had been taken or its return denied under a *bona fide* claim of title, *Commonwealth v. Donahue*, 148 Mass. 529 (1889), the facts of which are in substance similar to those in *Kirby v. Foster*, 17 R. I. 437 (1891); *State v. Elliot*, 11 N. H. 540 (1841); *State v. Dooley*, 121 Mo. 591 (1894); *Winter v. Atkinson*, 92 Ill. App. 162 (1900); *Hamilton v. Arnold*, 116 Mich. 684 (1898), and *Johnson v. Perry*, 56 Vt. 703 (1884). In *State v. Elliot* and *State v. Dooley*, it is however, said that less force must be used when there is an honest claim of title than when the taking is *felonious*, while in *Harris v. Marco*, 16 S. Car. 575 (1881), the court, while intimating that a man may resist the taking of his property within his view, though not in his manual possession, even by an assault and battery, if the taking be *felonious* or *without claim of right*, he may not commit a breach of the peace in an attempt to retake his property even taken within his view under a claim of right.

² *Accord: Shellabarger v. Morris*, 115 Mo. App. 556 (1905); *State v. Elliot*, 11 N. H. 540 (1841), p. 545; and see Sir Frederick Pollock's comment upon *Blade v. Higgs*, "but probably that case goes too far in allowing recaption by force, except perhaps on fresh pursuit."—*Law of Torts*, 9th Ed. 386, note (h), 399, note (g).

fused to go, that defendant thereupon ejected her, using no more force than was necessary—which is the assault and battery complained of. On the trial the defendant gave evidence tending to establish this defense. The court charged the jury “the defendant is strictly or technically liable to respond in this action. Any such interference with her person cannot be justified even if she was trespassing, &c.” To this the defendant excepted. The defendant thereupon also requested the court to charge that if the plaintiff was trespassing upon the farm of the defendant’s father at the time of the taking of the wood in question, and if on being required to leave the premises, the plaintiff refused, the defendant had a right to use sufficient force to eject her from the premises, and that if he used no more force than was sufficient for the purpose, the plaintiff was not entitled to recover. The court refused so to charge, and the defendant excepted.

The court further charged the jury to “find for the plaintiff such a verdict as you think will be just and proper,” and they found \$100.

JOHNSON, J. I am of the opinion that the new trial in this case was properly granted. Where one person has unlawfully entered upon the premises of another and possessed himself of the goods of the owner, such owner, or his agent, may surely, while upon his own premises, prevent the wrongdoer from taking such goods away, and may lawfully use so much force as may be necessary to retain his property and prevent its removal out of his custody and beyond his reach. The law does not oblige the owner of property to stand idly by and see a thief or trespasser take his property from his premises, or limit him to mere verbal remon-

So it is said by Holmes, J., in *Commonwealth v. Donahue*, 148 Mass. 529 (1889), that “it is settled by ancient and modern authority that . . . a man may defend or regain his temporarily interrupted possession by the use of reasonable force, short of wounding or the employment of a dangerous weapon.” This is quoted with approval in *Hemingway v. Hemingway*, 58 Conn. 443 (1890). In the first case the defendant offered to return goods purchased or to pay a sum less than that asked for them, the plaintiff accepted the lesser sum but immediately repudiated the condition and demanded the balance, thereupon the defendant forcibly repossessed himself of the money. In the latter case the plaintiff, a director of a company, and as such entitled to access to its letter book, took memoranda from it for the benefit of a rival company, whereupon the defendant, the secretary, on the plaintiff’s refusal to give it up, then and there took it from him by force.

In the following cases in which the right of forcible recaption is recognized without qualification, the possession was in fact only momentarily uninterrupted and the defendant tried to regain his property as soon as he knew that it was wrongfully taken or withheld, *Baldwin v. Hayden*, 6 Conn. 453 (1827), plaintiff was carrying off a letter just before given to him to read; *Rex v. Milton*, 1 M. & M. 107 (1827), plaintiff refused to give up a warrant which had been handed to him upon his request to see it; *State v. Elliot*, 11 N. H. 540 (1841); *Carter v. Sutherland*, 52 Mich. 597 (1894); so in *Wright v. Southern Express Co.*, 80 Fed. 85 (1897); *Hodgeden v. Hubbard*, 18 Vt. 504 (1846); *Anderson & Austin v. State*, 6 Baxter 608 (Tenn. 1872); *Commonwealth v. Donahue*, 148 Mass. 529 (1889), the defendant sought to re-take his property as soon as he discovered the fraud by which it had been obtained or the repudiation of the condition upon which it had been given.

strance. He may act promptly, and whether he may use force or not in the first instance, and what degree of force, depends upon the exigency of the particular case.¹ The mere taking of the property by the owner, under such circumstances, from the custody of the wrongdoer, without other force or violence, would not constitute an assault and battery.² If the taking, or the attempt to take, is resisted by the trespasser,³ and he persists in his attempts to retain possession, and carry the property off, then the owner may lawfully use so much additional force as may be necessary to prevent it. Such being the rule of law, both the charge and the refusal to charge as requested, were erroneous. The learned judge charged the jury that the defendant was not justifiable in using the force he did, conceding his own version of the matter to be in all respects correct. The evidence was conflicting, and the difference between the plaintiff's version of the affair and that of the defendant was quite marked, if not wholly irreconcilable. But, upon the hypothesis of the entire correctness of the defendant's testimony, it clearly cannot be said, as matter of law, that any unnecessary or unjustifiable force was used to prevent the removal of the property; especially in view of the persistent efforts of the plaintiff to take the property away after it had been taken from her by the defendant. The request to charge the jury embodied a proposition strictly in accordance with the law, as I understand the rule, and quite pertinent to the case, upon the evidence. The exception to the refusal to so charge was well taken. The order granting a new trial must therefore be affirmed.⁴

¹ Accord: *Carter v. Sutherland*, 52 Mich. 597 (1884); *Mengedocht v. Van Dorn*, 48 Nebr. 880 (1896); *Kunkle v. State*, 32 Ind. 220 (1869). The force must be reasonable and, unless the taking be felonious—*State v. Dooley*, 121 Mo. 591 (1894)—must stop short of wounding or the use of dangerous weapons, *Commonwealth v. Donahue*, 148 Mass. 529 (1889); *Kunkle v. State*, 32 Ind. 220 (1869). It is no defense to an action of false imprisonment that the plaintiff was detained and imprisoned for the purpose of forcing him to give up the wrongful possession of the defendant's chattel, *Harvey v. Mayne*, Ir. Rep. 6 C. L. 417 (1872); *Davis v. Whitridge*, 2 Strob. 232 (S. Car. 1847).

² In *Hodgeden v. Hubbard*, 18 Vt. 504 (1846), emphasis is laid on the fact that "to obtain possession of the property in question, no violence to the person of the plaintiff was necessary, or required, unless from his resistance." It was not like property carried about the person, as a watch or money; accord: *State v. Elliot*, 11 N. H. 540 (1841); *Johnson v. Perry*, 56 Vt. 703 (1884).

³ "The person in wrongful possession has no right to resist the attempt of the defendant to regain his property"; cases cited in Note 2, *supra*. But see *Sims v. Reed*, 12 B. Monr. 51 (1851), holding that one may use force to defend his peaceable though wrongful possession even against the owner.

⁴ Accord: *Johnson v. Perry*, 56 Vt. 703 (1884), the plaintiff had gone on the defendant's premises and taken slabs belonging to the latter and had loaded them upon his sled and was about to remove them, when the defendant interfered and threw the slabs from the sled, using such force as was necessary to overcome the plaintiff's opposition thereto; *Hamilton v. Arnold*, 116 Mich. 684 (1898), the plaintiff had picked plums on land, found by the jury to belong to the defendant, but honestly claimed by the plaintiff's husband, and was attempting to carry them away; and see *Winter v. Atkinson*, 92 Ill. App. 162 (1900), and *Baldwin v. Hayden*, 6 Conn. 453 (1827).

ANDRE v. JOHNSON.

Supreme Court of Indiana, 1843. 6 Blackford's Ind. Repts., 375.

DEWEY, J. This was an action of trespass by Johnson against Andre. The first count of the declaration alleges that the defendant assaulted the plaintiff, forced and pushed him with great violence off his horse, threw him down upon the ground, struck him violently, and with great force, insult, and abuse, wrested the horse, saddle, and bridle of the plaintiff from his possession. The second count is for taking and carrying away the horse, saddle, and bridle of the plaintiff.

The defendant pleaded, 1. The general issue. 2. That the supposed trespasses in the first and second counts mentioned were one and the same, and not other or different trespasses; that as to the force, &c., and all the supposed trespasses in the declaration mentioned, except the forcing the plaintiff off his horse, pushing him down upon the ground, wresting the horse, saddle, and bridle from him, carrying them away, the defendant was not guilty, and put himself upon the country. And as to the residue of the supposed trespasses, *actio non*, because the horse was the property of the defendant; that the plaintiff, with his own saddle and bridle, was "tortiously" mounted upon the horse in a public street; that the defendant requested him to dismount and give up the horse; that he refused; whereupon the defendant, for the purpose of obtaining possession of the horse, "gently laid his hands upon the plaintiff" and dismounted him; that the defendant took possession of the horse, and in so doing necessarily forced and pushed the plaintiff down upon the ground; and that he necessarily removed the saddle and bridle to a small and convenient distance, (specifying the place), where he left them for the use of the plaintiff, doing them no needless injury; which were the same, &c.

The plaintiff replied *de injuria*, &c., upon which there was issue. Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

It is contended that the court erred in overruling the motion for a new trial.

It appears by the record, that the plaintiff fully established by testimony the assault and battery as laid in the first count, except the striking of him by the defendant. Whether the defendant proved the facts set forth in his special plea we have not inquired, because if he did, they constituted no justification of that part of the assault and battery to which they refer. The plea shows no force on the part of the plaintiff in obtaining possession of the horse, nor at what time he obtained it. It simply states, in reference to this matter, that he was tortiously possessed in a public street, and that he refused to give up the horse on the demand of the defendant. It is not lawful for the owner of property to take it from the peaceable though wrongful possession of another, by

means of violence upon his person; the remedy lies in a resort to law, not to force.¹ 3 Bl. Comm. 4.

CHAMBERS v. BEDELL.

Supreme Court of Pennsylvania, 1841. 2 Watts & Sergeant's Penn. Rep., 225.

ERROR to the District Court of Allegheny county.

Andrew Bedell against William Chambers and others. This was an action of trespass *quare clausum fregit*, in which the defendant pleaded not guilty.

The parties were owners of adjoining tracts of land, and disputed about their partition line. The plaintiff cut a quantity of rails upon the land in dispute, and hauled them to another part of his land, which was not in dispute. The defendant went there in the night and hauled the rails away, for which this action of trespass was brought.

It appeared clearly on the trial that the land where the rails were cut belonged to the plaintiff. The court below, in answer to a point put by the defendants, instructed the jury, that whether the land belonged to the plaintiff or not, he was at least entitled to recover nominal damages; but that the evidence clearly and conclusively established the plaintiff's title, and he was therefore entitled to recover the value of the property taken in damages.

PER CURIAM. It is certain, that if the chattel of one man be put upon the land of another by the fault of the owner of the chattel, and not by the fault or with the connivance of the owner of the land, the owner of the chattel cannot enter to retake it; but that it be put there without the fault or consent of either party, the owner of the chattel may enter and take it peaceably,¹ after de-

¹ *Accord: Bobb v. Bosworth*, 2 Littell's Selected Cases, 81 (Ky. 1808); *Barnes v. Martin*, 15 Wis. 240 (1862); *Bliss v. Johnson*, 73 N. Y. 529 (1878), *semble*; *Street v. Sinclair*, 71 Ala. 110 (1881), *semble*; *Watson v. Rinderknecht*, 82 Minn. 235 (1901); and see *Stanley v. Payne*, 78 Vt. 235 (1905), though there neither the original possession nor the detention, that of a bailee pending consultation with his bailor, was wrongful, and see *Fredericksen v. Singer Mfg. Co.*, 38 Minn. 356 (1888).

In *Hendrix v. State*, 50 Ala. 148 (1873), it was held that it was no defense to an indictment for assault and battery, committed in an attempt to obtain possession of a horse, ridden by the prosecutor, that the horse had been stolen from the defendant some time before, by a person not named. And in *Sabre v. Mott*, 88 Fed. 780 (Circ. Ct. of Vt. 1898), it was held that the defendant was not justified "in using force, much less in committing an assault to retake property which had been in the plaintiff's peaceable possession for a day," though here, as in *Bobb v. Bosworth*, 2 Littell's Selected Cases, 81 (Ky. 1808), the title was in dispute.

² *Accord: Richardson v. Anthony*, 12 Vt. 273 (1840), the heifers in question had been for a year in the peaceable possession of the plaintiff, who forbade the defendant to enter and retake them; there being no averment or evidence how they had come into the plaintiff's possession, it was held that "no fault is attributable to either party so far," but they, being detained "under wrongful claim of title after request to return them or to allow

mand and refusal of permission, repairing, however, any damage which may be occasioned by his entry.² So, also, where the parties are in equal default, for instance, by omitting to repair a partition fence, by reason of which the cattle of the one happens to stray into the close of the other.³ But all the books agree, that where a chattel escapes from the possession of its owner by his consent, exclusive negligence, or other default, he cannot pursue it into the close of another, without becoming a trespasser by his entry;⁴ but that he may lawfully enter and retake his property, where it has been wrongfully taken or received by the owner of the land.⁵ Now,

the owner to remove them, were in his enclosure, when they were taken, by his own wrong." *Contra: Salisbury v. Green*, 17 R. I. 758 (1892), where also the plaintiff had had long continued peaceable possession of chattels under claim of right; *Blake v. Jerome*, 14 Johns. 406 (N. Y. 1817); *Roach v. Damron*, 2 Humph. 425 (Tenn. 1841); *Chess v. Kelly*, 33 Blackf. 438 (Ind. 1834); and see *Chase v. Jefferson*, 1 Houst. 257 (Del. 1856). The right to enter after demand and refusal, when the chattels come on the land by their owner's wrong or consent, is denied in *Newkirk v. Sabler*, 9 Barb. 652 (N. Y. 1850). The mere fact that the defendant's goods are on the plaintiff's land, gives no right to enter, at least before demand and refusal, so a plea merely alleging the defendant's goods to be on the plaintiff's premises without showing how they came there, was held in *Anthony v. Haney*, 8 Bing. 186 (1832), to be bad on demurrer; *Goff v. Kalts*, 15 Wend. 550 (N. Y. 1836); *Salisbury v. Green*, and other cases cited above as contra to *Richardson v. Anthony*, 12 Vt. 273 (1840).

²In *Anthony v. Haney*, 8 Bing. 186 (1832), it was intimated that no matter how the goods came on the premises of the owner "if the occupier refused to deliver them up or make no answer to the owner's demand, at any rate the owner might in such case enter and take his property, subject to the payment of any damage he might commit." This is sharply criticised by Judge Cooley, law of Torts, 50 n. 2; "If," he says, "he were liable in damages for the entry, it must be because it is unlawful; and in that case it might be resisted. There can be no such absurdity as a right of entry and a co-existent right to resist the entry."—but see *Vincent v. Lake Erie Co.*, cited in Note 3 to *Ploof v. Putnam*, post. The right of entry was allowed in *Richardson v. Anthony*, 12 Vt. 273 (1840), without any such condition.

³1 Dane's Abr. C. 134, §13, cited in *Wheelden v. Lowell*, 50 Maine 499 (1862).

⁴So where the owner has himself put the goods on the other's land, (*Newkirk v. Sabler*, 9 Barb. 652 (N. Y. 1850)), or has consented to their being put or kept thereon, *Crocker v. Carson*, 33 Maine 436 (1851); *Roach v. Damron*, 2 Humph. 425 (Tenn. 1841); or has bailed the goods to such other, *McLeod v. Jones*, 105 Mass. 403 (1870)—but see *Madden v. Brown*, 8 App. Div. 454 (N. Y. 1896),—though he has the right to their possession, he cannot enter to take them without the owner's permission, unless the nature of the dealings between the parties requires the implication of a license to enter. Where one sells, *Nettleton v. Sikes*, 8 Metc. 34 (Mass. 1834); *Newkirk v. Sabler*, 9 Barb. 652 (N. Y. 1850); *McLeod v. Jones*, 105 Mass. 403 (1870), *semble*,—but compare *Crocker v. Carson*, 33 Maine 436 (1851), or mortgages, *Zimmler v. Manning*, 2 S. C. R. (N. S. W.) 235 (1863), *semble*; *McNeal v. Emerson*, 15 Gray 384 (Mass. 1860), goods on his premises, there is an implied license to enter such premises to remove them, but not to enter other premises to which they may have been removed; *McLeod v. Jones*, 105 Mass. 403 (1870), and such license only binds the vendor or mortgagor, *Roach v. Damron*, 2 Humph. 425 (Tenn. 1841); *Zimmler v. Manning*, 2 S. C. R. (N. S. W.) 235 (1863).

⁵In *Patrick v. Colerick*, 3 M. & W. 483 (1838), Parke, B., says, "that when a party places the goods of another upon his own close, he gives to

if the property in the rails in question had been in the defendant, the plaintiff who had piled them up on his land, could not have recovered even nominal damages for the defendant's entry to remove them; and in this respect the direction would have been wrong. But it was in clear and uncontradicted proof, that the defendant, Chambers, had not even a colourable title to the land where the rails were grown and made, and consequently not even a colourable title to enter on the plaintiff's land in order to carry them away; and the inaccuracy of the charge, in this abstract particular, was therefore immaterial.

Judgment affirmed.*

the owner an implied license to enter for the purpose of recaption." But the plea held good alleged a wrongful taking by the plaintiff from the defendant's possession and a fresh pursuit.

When the plaintiff has wrongfully taken the goods, the right of entry is generally allowed; *Anon.*, Y. B. 9 Edw. IV, 35, pl. 10 (1469), per Littleton, J.; *Salisbury v. Green*, 17 R. I. 758 (1892), *semble*; *Madden v. Brown*, 8 App. Div. 454 (N. Y. 1896); *Wheelden v. Lowell*, 50 Maine 499 (1862); goods obtained by fraudulent purchase; *McLeod v. Jones*, 105 Mass. 403 (1870), *semble*; *Murray v. M'Neil*, 1 N. S. W. W. N. 136 (1885), *semble*, *Graham v. Green*, 10 New Brunswick (5 Allen) 330 (1802), and if the taker refuse to give them up, the owner in order to retake them may break into his close to obtain them. In *Pollyes Case*, Godbolt 282 (1620), it is said that in such case the owner may justify an entry upon the wrongful taker's land but not his house, for that is "his castle," into which another man may not enter without his consent"; *accord*: *Cutler v. Smith*, 17 Ill. 252 (1870). But see *Anon.*, (1638), *Clayton*, 65 (pl. 111), where the defendant, whose goods had been wrongfully distrained, was held justified in entering the wrongdoer's house to retake them.

So where the goods are taken by a third party and placed with the plaintiff's consent on his land, *Chapman v. Thumblethorp*, Cro. Eliz. 329 (1594), in which, while the court stated broadly that whenever the defendant's beasts are taken from him by wrong and are not out of his possession by his own delivery, he may justify the taking of them in any place he may find them, the plea which was held good averred that the wrongful taker placed the goods on the plaintiff's close with his assent. *Accord*: *Zimmer v. Manning*, 2 S. C. R. (N. S. W.) 235 (1863).

If goods, originally stolen, *Collomb v. Taylor*, 9 Humph. 689 (Tenn. 1849), *semble*, or transferred in fraud of the owner's rights, *Murray v. M'Neil*, 1 N. S. W. W. N. 136 (1885), are in the possession of a bona fide holder, the owner though entitled to the possession, cannot justify an entry upon the premises of the purchaser for the purpose of retaking them.

*"If a man wrongfully imprisons me in his house, I may break the windows and hedge to escape, &c., for in all these cases it is the plaintiff's wrong"; Littleton, J., Y. B., 9 Edw. IV, 34, pl. 10 (1469). So one, who is in possession of goods upon the premises of another, may justify breaking doors or gates to remove them, if the occupier of the premises attempts to unlawfully detain them by locking the gates, *Robson v. Jones*, 2 Bailey 4 (S. Car. 1830).

One upon whose lands another's goods have been placed or allowed to remain, may justify taking them and putting them upon the owner's premises, and in so doing is not guilty of either trespass *quare clausum fregit* or *de bonis asportatis*, *Cole v. Maunder*, 2 Rolle. Abr. 548 (1635), *Rea v. Sheward*, 2 M. & W. 424 (1837), but he must do so in a reasonable manner and put them in a place where they will cause no unnecessary damage or inconvenience, *Burnham v. Jenness*, 54 Vt. 272 (1881).

CUNNINGHAM v. YEOMAN.

Supreme Court of New South Wales, 1868. 7 Sup. Ct. Rep. N. S. W., 149.

Action of trespass *quare clausum fregit*. Declaration in substance alleged that defendant broke into and entered plaintiff's dwelling house with his servants, and broke and pulled down the doors of same, and with the servants remained therein a long time. Plea, that before and at the time of the alleged grievance the defendant was possessed of certain horses which had been feloniously stolen from him by certain persons and were by or with the privity of the plaintiff placed upon the premises of the plaintiff, and that the defendant being informed and having probable cause to believe that the horses were on the said premises, made pursuit after his horses and quietly and peaceably entered with his servants to view the said horses so belonging to him and carry them away as he lawfully might, doing no unnecessary damage. Demurrer and joinder.

STEPHEN, C. J. If a chattel be feloniously taken, and put on a third person's premises by the latter's consent, the latter, although not cognizant of the felony, justly incurs the risk of the thing turning out to be stolen; and for the sake of public justice, and the repressing of crime, the owner of the property has, and ought to have at any time, the right of entry on such person's premises, and of retaking the chattel. I see no reason why the right of recaption should be limited to cases where there is fresh pursuit. It has been held that in cases of trespass, hue and cry makes no difference. Public policy, which supersedes all questions of private interest, requires that every felony should be punished, and that an opportunity of prosecuting the thief to conviction should be facilitated by the production of the stolen property; and I think this distinguishes the cases of goods taken by trespass and by felony. If a stolen horse is on land not with the consent of the owner of the land, an entry by the owner of the horse on such land may be unlawful;¹ but if the owner of the land has allowed a stolen horse to be placed there, why may not the owner of the horse in the interest of the public enter and retake him? *Baldwin v. Noaks*, in 2 Lutwyche 1309, supports this proposition; and in that case there is no mention of fresh pursuit. The authority of Blackstone, cited and approved of by Lord Chief Justice Tindal, in *Anthony v. Haney*, implies that the right of recaption exists where the goods have been feloniously stolen. I doubt whether a search warrant was necessary under such circumstances. Such an authority would be neces-

¹In *Webb v. Bevan*, 6 M. & G. 1055 (1844), the plea held good alleged merely that his recently stolen mare was in the plaintiff's stable; but see the reporter's note (b), in which he says: "The entry upon the plaintiff's land would appear to be lawful if the defendant's goods were brought there with the privity of the plaintiff or it would seem, if brought there by any person who was upon the close with the permission of the owner."

sary, if it turned out that the goods were not on the premises; nor could outer doors be broken open, unless under such a warrant.²

As to the breaking of doors for the purpose, that may or may not be justifiable. But that question does not yet arise; for, as complained of in the declaration, it is matter incidental only to the entry, and therefore is matter of aggravation merely. If the plaintiff desires to make it matter of substantial complaint, he can new-assign.

I am not clear whether, if the horse here had been taken by trespass merely, but put on the plaintiff's premises by his consent, after such trespass, the authority of *Zimmer v. Manning* would apply.

CHEEKE, J., concurred.

FAUCETT, J. The breaking and pulling down the doors, and the remaining in the plaintiff's house for a long time, is, it is clear, only matter of aggravation; and the pleader who drew the demurrer evidently was of this opinion; for the plea is not stated to be insufficient on any such ground.

I give no opinion whether the entry is justifiable if the horse has been taken by trespass; but I have no hesitation in acting on the authority of *Higgins v. Andrews*, which is referred to in 2 Lutwyche, and has been constantly recognized in the Abridgments, and which is relied on in the passage from Blackstone's Commentaries, quoted with approval by Lord Chief Justice Tindal in *Anthony v. Haney*. Where goods have been stolen, the owner of the land where those goods are placed with his privity, although ignorant that the felony has been committed,³ cannot complain if the owner of the goods enters upon his land and retakes them. No notice or demand is in such case necessary. The rule is founded on public policy, and that the ends of justice may not be defeated. I think it is not necessary to allege fresh pursuit;⁴ for it is plain that it may be some time before it is known where the stolen property is to be found.

Judgment for the defendant.⁵

² See *Pollyes* case, note 5 to *Chambers v. Beddell*, ante.

³ As to whether it is necessary, when goods are *tortiously* taken by a third party and placed by him on the plaintiff's land, to show not merely that the plaintiff assented to the goods being placed there, but that he did so knowing them to be *tortiously* taken, see *Baldwin v. Noaks*, 2 Lutw. 1309 (1684); Wells, J., in *McLeod v. Jones*, 105 Mass. 403 (1870), intimating that the owner of the land must be a participant in the wrongful taking; and Bennett, J., dissenting in *Richardson v. Anthony*, 12 Vt. 273 (1840), p. 279, who says that, by his consent, "the landholder becomes a participant in the wrong."

⁴ Both wrongful taking and fresh pursuit is held essential in *Salisbury v. Green*, 17 R. I. 758 (1892); compare *Kirby v. Foster*, note to *Blades v. Higgs*, ante.

⁵ In *Higgins v. Andrews*, 2 Rolle. Abr. 564 (1618), 2 Rolle. Rep. 55, it is held that I cannot justify entering another's house on the common report that a third person, who has wrongfully torn up my trees, has placed them in such house "inasmuch as the taking away of these trees annexed to the freehold was not a felony but only a trespass."

In *Topladye v. Stalye*, Style 165 (1649), it was held a plea that mere

(c) Abatement of nuisance.

ANONYMOUS.

In the Common Pleas, 1469. Year Book, 9 Edward IV, f. 34, pl. 10.

Writ of right. CHOKE, J. The main question is, whether the pulling up of the stakes of the pond was lawful; for, if so, the tearing down of the house was lawful, for he says in his plea that he could not have pulled up the stakes without the house falling down.

FAIRFAX. It seems that he shall be put to his action of trespass or nuisance, for he could not enter the freehold of the plaintiff; and, sir, if a man has a sewer running from his place in London to the Thames, and it is stopped up, he cannot break the soil to clear it, but is put to his action.

LITTLETON, J. It seems that he may well pull up the stakes, for they were erected to his nuisance; and if he had waited to bring an action, his land might have been surrounded, and he would have lost the profits of his mill meanwhile,¹ and it seems to me that the

common rumor that stolen sheep were on the plaintiff's land would not justify an entry, since it did not show how they came thereon, whether as strays or by theft of the plaintiff, or placed there by the thief with the plaintiff's consent.

¹ But one abating a nuisance, private or public, is liable for any damage done which is not necessary to effect the abatement, *Gates v. Blincoe*, 2 Dana 158 (Ky. 1834); *Calef v. Thomas*, 81 Ill. 478 (1876); *Indianapolis v. Miller*, 27 Ind. 394 (1866); *Moffett v. Brewer*, 1 G. Greene 348 (Iowa 1848); *Chillicothe v. Bryan*, 103 Mo. App. 409 (1903), though he is not bound to do so in the manner most convenient to the owner of the nuisance, it being the interests of the person aggrieved which must prevail, *Great Falls Co. v. Worster*, 15 N. H. 412 (1844); *McKeesport Sawmill Co. v. Pennsylvania Co.*, 122 Fed. 184 (1903).

Only so much of the offending things as constitute the nuisance can be removed, *Moffett v. Brewer*, 1 G. Greene 348 (Iowa 1848); *Moody v. Niagara*, 46 Barb. 649 (N. Y. 1866); *Dyer v. Depui*, 5 Whart. 584 (Pa. 1840); nor can the offending structure be destroyed, if its removal will abate the nuisance, *Smart v. Commonwealth*, 27 Grat. 950 (Va. 1876), nor can a structure be removed, *Morrison v. Marquardt*, 24 Iowa 35 (1868), or a pond filled up, *Finley v. Hershey*, 41 Iowa 389 (1875), if its offensive character can otherwise be remedied. So while one, over whose land the branches of a neighbor's trees extend, may cut off the intruding branches, *Grandona v. Lovdal*, 70 Cal. 161 (1886); *Robinson v. Clapp*, 65 Conn. 365 (1895); *Hickey v. Mich. Cen. R. Co.*, 96 Mich. 498 (1893), he may not cut down the trees, *Grandona v. Lovdal*, 70 Cal. 161 (1886); *Hickey v. Mich. Cen. R. Co.*, 96 Mich. 498 (1893).

So a building cannot be destroyed because it is so used as to create a nuisance, "the remedy is to stop such use," Woodward, J., in *Barclay v. Commonwealth*, 25 Pa. St. 503 (1855); *Earp v. Lee*, 71 Ill. 193 (1873); *Brown v. Perkins*, 12 Gray 89 (Mass. 1858); *State v. Paul*, 9 R. I. 185 (1858); *State v. Keeran*, 4 R. I. 497 (1858); *Moody v. Niagara*, 46 Barb. 659 (N. Y. 1866), unless such use cannot be stopped save by the destruction of the building, *Harvey v. Dewoody*, 18 Ark. 252 (1856), a wooden shanty frequented by vagrants.

And one assuming to abate a condition or structure as a nuisance, takes the risk of proving to the satisfaction of the jury that it is in fact a nuisance,

entry upon the plaintiff's land was lawful; to abate the nuisance for the wrong done was the wrong of the plaintiff.^a

And if water flows *juxta villam* and is stopped, any one in the vill may tear down the obstruction, &c., or otherwise the whole vill would be surrounded, &c. And if a man wrongfully imprisons me in his house, I may break the windows and hedge to escape, &c., for in all these cases it is the plaintiff's wrong, and so here.

NEEDHAM, J. If a man puts up a house to the nuisance of my house, I may be in my own house or land and pull down his house, and justify this; so in this case the defendant shall not be punished for pulling down the house nor removing the stakes; but as to the entry upon the land, this action is not brought for the entry, &c.; wherefore, &c.; but I think the entry is not lawful.

DANBY, C. J. And, sir, in the case at bar the removal of the stakes seems lawful; for supposing the defendant were tenant for years, he could not have an assize of nuisance; and if he brought trespass he would recover damage for the wrong done before the purchase of the writ, and a nuisance, notwithstanding such suit, would continue; and so it would be mischievous if he could not abate the nuisance. And the opinion of all the judges was, that the destruction of the house was lawful, *quare* as to the entry.

LITTLETON said that DANBY was of opinion that the entry was lawful, &c., wherefore, if a man makes a ditch in his land, by which the flow of water to my mill is diminished, I may refill the ditch with the earth dug up, &c.^b

HARROWER v. RITSON.

Supreme Court of the State of New York, 1861. 37 Barb. Rep. 301.

ALLEN, J. The encroachment of the plaintiff's fence upon the highway was, it would seem, hardly disputed upon the trial. The only question of fact upon which conflicting evidence was given was whether the fence was an obstruction to the travel, and interfered with the use of the road by the public. And upon this branch of the case several witnesses, in behalf of the plaintiffs, testified that the fence torn down did not and could not interfere with the travel west of the angle; and all the testimony was that

Tissot v. Great Southern Tel. Co., 39 La. Ann. 996 (1887), and see *Sharswood, J.*, in *Fields v. Stokley*, 99 Pa. St. 306 (1882); and *Reed v. Seely*, 13 Pa. Co. Ct. 529 (1893), municipal officers abating public nuisances without authority of the municipal legislative councils.

^a *Accord: Mayhew v. Burns*, 103 Ind. 328 (1885); *Lancaster Turnpike Co. v. Rogers*, 2 Barr 114 (Pa. 1845), *semble*; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53 (1857); *Larson v. Furlong*, 63 Wis. 323 (1885).

^b So in *Y. B.*, 8 Edw. IV, 5, pl. 15 (1468), that Choke, J., held that by common law, I may abate a house upon another's land so built as to cause the water to run upon my land, and Danby said, "That if water runs upon the land of M. and M. stops the water from its course, so that it surrounds my land, I can well abate that which stops it, and to my mind he shall not have an action for the entry into his close, because that is by his own wrong."

at the angle and with the fence a single team could easily and safely pass, and that without the fence two teams could not pass.

The fence was undoubtedly, upon the finding of the jury, an encroachment upon the highway, which might have been removed by proceedings under the statute. (1 R. S. 521.) It was also a public nuisance, and indictable as such. (4 Bl. Com. 167.) And had the plaintiffs been indicted for erecting the nuisance, the charge of the judge would have been strictly accurate. It would have constituted no defense that travel was not entirely obstructed and hindered. The public have the right to the entire width of the road—a right of passage in the road to its utmost extent, unobstructed by any impediment. The plaintiffs could not lawfully by their fence render the passage over the road less convenient or safe than it would have been, but for the encroachment. (*People v. Cunningham*, 1 Denio, 524. *King v. Russell*, 6 East, 427. Per Denio, Ch. J., *Davis v. Mayor of New York*, 14 N. Y. Rep. 524.) “Any permanent or habitual obstruction in a public street or highway is an indictable nuisance, although there be room enough left for carriages to pass.” (See also *Rex v. Lord Grosvenor*, 2 Stark. 511; *Queen v. Betts*, 16 Q. B. Rep. 1022.) If every indictable nuisance may be abated by any one, upon his own motion, who chooses to take the law into his own hands, the justification of the defendants was completed, and the court properly refused the instructions asked for, to the effect that an individual was not authorized to abate the nuisance by the removal of the fence, unless it interfered with the use of the road. The claim is that the erection and maintenance of the nuisance being a misdemeanor, any one may abate it, as it is for the interest of the public that it should not exist. If this is so, it is the only case where, in the absence of any necessity, the vindication and execution of the law are devolved upon the private citizen; and I have found no case that goes this length. The doctrine would tend, manifestly, to breaches of the public peace, and might lead to the oppression of wrongdoers, which should be guarded against. Private nuisances may be abated by the individuals aggrieved by them. (3 Bl. Com. 5, 2 Bouv. Inst. 574.) And public nuisances should only be subject to abatement by one especially aggrieved by them. Blackstone says: “If a new gate be erected across the public highway, which is a common nuisance, any of the king’s subjects passing that way may cut it down and destroy it.” The reason assigned is, that the injury requires an immediate remedy. (3 Black. Com. 6.) The instance given is that of a total obstruction of the road by the erection of a gate across it, rendering its destruction by the passerby a necessity. Mr. BROOM, commenting on and explaining this passage from Blackstone, says that to justify a private individual in abating, on his own authority, such a nuisance, it must appear that it does him a special injury; and he can only interfere with it as far as may be necessary to exercise his passing along the highway with reasonable convenience, and not because the obstruction happens to be there. (Broom on Com. Law, 250.) *The Mayor &c. of Colchester v.*

Brooks, (7 Q. B. Rep. 339) was an action on the case for injuring the plaintiff's oyster beds in a river, by improper navigation of the defendant's vessels. * * * The Court of Queen's Bench held that although the oysters were placed in the channel of a public navigable river so as to create a public nuisance, a person navigating was not justified in damaging such property by running his vessel against it, if he had room to pass without so doing; for an individual could not abate a nuisance if he was not otherwise injured by it than as one of the public; and therefore the fact that such property was a nuisance was no excuse for running upon it negligently. Lord Denman, Ch. J., delivered the opinion of the court, and says if there was abundance of room and of water for the vessel to have passed up without going near the alleged nuisance, "however wrongful the act of the plaintiff, yet, as the defendant sustained no special inconvenience thereby, he certainly could not have been justified in wilfully infringing upon or destroying the oysters, even for the purpose of abating the nuisance." Again, "In the case of a private nuisance, the individual aggrieved may abate, (3 Black. Com. 5,) so as he commits no riot in doing it; and a public nuisance becomes a private one to him who is specially and in some particular way incommoded thereby, as in the case of a gate across a highway which prevents a traveler from passing, and which he may therefore throw down; but the ordinary remedy for a public nuisance is itself public, that of indictment;¹ and each individual who is *only* injured as one of the public, can no more proceed to abate than he can bring an action." The same principle was distinctly reaffirmed in *Dimes v. Petley*, (15 Q. B. Rep. 276,) Lord Campbell,

¹ While it is generally stated that the remedy for a purely public nuisance is by indictment, *Griffith v. McCullum*, 46 Barb. 561 (N. Y. 1866); *Earp v. Lee*, 71 Ill. 193 (1873), unless some other remedy is provided by statute, and while it is held that, where the statute declaring the nuisance prescribes the method of removing it, such method is the exclusive remedy, *Brown v. Perkins*, 12 Gray 89 (Mass. 1858); *Hamilton v. Goding*, 55 Maine 419 (1867), yet it is held in many cases that public authorities, charged with the duty of care of highways, *Reynolds v. Urban Council, &c.*, L. R. 1896, 1 Q. B. 604, may abate any unlawful obstruction of such highway, *Neal v. Gilmore*, 141 Mich. 519 (1905), such obstruction being said to be a special grievance to him by reason of his duty, and municipal authorities have been held entitled to remove obstructions interfering with the use of public wharves, etc., *Hart v. Albany*, 9 Wend. 571 (N. Y. 1832), pp. 590 and 609; *McLean v. Mathews*, 7 Ill. App. 599 (1880); *Gunter v. Geary*, 1 Cal. 462 (1851), *semble*.

A municipality has the power to abate nuisances under the police power delegated to it by its charter or by statute, *Baker v. Boston*, 12 Pick. 184 (Mass. 1831), and cases cited Cent. Dig. Vol. 36, 'Municipal Corporations,' § 1371.

"A municipality may, with a strong hand, abate a public or common nuisance, which endangers either the health or safety of its citizens"—Paxson, C. J., in *Easton &c. Pass. R. Co. v. Easton*, 133 Pa. St. 505 (1890), p. 520; *Fields v. Stokley*, 99 Pa. St. 306 (1882), the mayor of Philadelphia held entitled to tear down wooden shanties adjacent to the grounds and buildings of the Centennial Exhibition, and threatening them with imminent danger of a conflagration; *Harvey v. Dewoody*, 18 Ark. 252 (1856), vacant wooden building, frequented by reckless and disorderly persons, torn down by order of the mayor and town council.

Ch. J. delivering the judgment of the court, in which he says: "Now it is fully established by the recent cases, (citing them,) that if there be a nuisance in a public highway a private individual cannot of his own authority abate it, unless it does him a special injury; and he can only interfere with it as far as it is necessary to exercise his right of passing along the highway; and without considering whether he must show that the abatement of the nuisance was absolutely necessary to enable him to pass, we clearly think that he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience." One who is injured by an obstruction placed unlawfully in a highway cannot maintain an action for damages, if it appears he did not use ordinary care by which the obstruction might have been avoided. (*Irvin v. Sprigg*, 6 Gill, 200. *Smith v. Smith*, 2 Pick. 621. *Davies v. Mann*, 10 Mees. & Wells. 545.)

The precise question presented here was considered and decided in *Bateman v. Bluck*, (18 Q. B. Rep. 870,) which was trespass for entering the plaintiff's close and pulling down a wall therein. Plea that the close was a public pavement within the metropolitan paving act of 57 Geo. III., ch. 29; that the plaintiff unlawfully, and contrary to the act, erected thereon the said wall; and because the wall incumbered the pavement, and the plaintiff refused, on the defendant's request, to remove the same, the defendant entered and pulled it down. And it was held, on motion for judgment *non obstante veredicto*, that the plea was bad for not showing that it was absolutely necessary for the defendant, in order to exercise the alleged right of passage, to remove the wall. In *Arundell v. McCulloch*, (10 Mass. Rep. 70,) the navigation of a navigable river was obstructed by a bridge erected by the plaintiffs, and the bridge was removed by the defendant to facilitate the passage of a vessel belonging to him, built above the bridge, and as little damage was done to the bridge as was possible. The court held the defendant justified; saying, "Here nothing more was done than was necessary to procure a safe passage for the defendant's vessel."

The question has not been directly passed upon by the courts of this state, but general expressions of judges have led to the inference that every common nuisance which was indictable might be abated by any individual; that indictment, and abatement by individual action, were concurrent remedies for all public nuisances. And in *Hart v. Mayor of Albany*, (9 Wend. 571,) some of the members of the court for the correction of errors were of the opinion that any person might abate a common nuisance, whether he was specially aggrieved by it or not. But it was not necessary to pass upon it, as the defendants had full power to remove all obstructions from the river and harbor, under the city charter. And the reporter, in the head note to the case, leaves the proposition in this form: "Whether an individual without being specially aggrieved, has a right to abate or remove such nuisance, *quære*."²

² A part of the opinion discussing the cases of *Rogers v. Rogers*, 14 Wend.

If the unqualified right exists, and any person may of his volition and without process of law abate a public nuisance upon the peril only of showing in justification that the property destroyed or removed is a nuisance, and indictable as such, there can be no distinction made as to the kind or character of the nuisance. It may be a particular trade, which is only obnoxious because carried on in a particular place or in a particular manner;³ it may be something which affects the health, or the air, or renders the enjoyment of property uncomfortable, or depreciates the value of property; or it may be something which tends to a breach of the public peace—a disorderly house, a gaming house, or a hospital,⁴ as well as the obstruction of a navigable river, or a public highway, or the inclosure of a common. To suffer any one, without necessity, to become the executor of this branch of the common law, without the intervention of the ordinary forms of law and a resort to the process of the courts, would tend to gross injustice, breaches of the peace and riots, and the remedy would be worse than the evil to be redressed. But if individual action, in the abatement of nuisances, be restricted and the power qualified and limited as by the English cases, and thus cited from the courts of some of the United States, no serious mischief can arise, and none of which the wrongdoer has a right to complain. An individual aggrieved by a private nuisance may have his action, or he may abate the nuisance.⁵ A party sustaining a special injury from a public or common nuisance may also have his action, and in the like case he may abate the nuisance. In the language of Lord Campbell, it be-

131 (N. Y. 1835); *Wetmore v. Tracy*, 14 Wend. 250 (N. Y. 1835), and *Renwick v. Morris*, 3 Hill 621, 7 Hill 575 (N. Y. 1844), and holding the statements asserting a general right of abating public nuisance, contained therein, to be mere *dicta*, is omitted.

³ When the nuisance consists in the use of a building, and not its physical character or condition, the proper remedy is the termination of the wrongful use, and not the removal or the destruction of the building, *Brown v. Perkins*, 12 Gray 89 (Mass. 1858); *State v. Paul*, 5 R. I. 185 (1858); *State v. Keeran*, 4 R. I. 497 (1858); *Moody v. Niagara Co.*, 46 Barb. 659 (N. Y. 1866); *Barclay v. Commonwealth*, 25 Pa. St. 508 (1855); but see *Harvey v. Dewoody*, 18 Ark. 252 (1856), where the improper use could practically not be prevented except by destroying the building.

⁴ So it is held that private individuals cannot destroy whiskey, kept for sale against a statutory prohibition, whether the statute declares such keeping a nuisance or not, *Brown v. Perkins*, 12 Gray 89 (Mass. 1858); *Hamilton v. Goding*, 55 Maine 419 (1867); nor tear down a building where such whiskey is kept, *Brown v. Perkins*, 12 Gray 89 (Mass. 1858); *Earp v. Lee*, 71 Ill. 193 (1873); *State v. Paul*, 5 R. I. 185 (1858); *State v. Keeran*, 4 R. I. 497 (1858); or which is used in a manner to be a nuisance by common law or by statute, *Moody v. Niagara Co.*, 46 Barb. 659 (N. Y. 1866), affirmed under the name of *Ely v. Niagara County*, 36 N. Y. 297 (1867), a bawdy-house destroyed by a mob; *Welch v. Stowell*, 2 Dougl. 332 (Mich. 1849).

⁵ The right to abate is usually said to exist if, and only if, there is a right of action for damages, *Watts v. Norfolk & W. R. Co.*, 39 W. Va. 196 (1894); *Prieue v. Fitzsimmons & Co.*, 117 Wis. 497 (1903). "In the case of a private nuisance," says Marvin, J., in *Griffith v. McCullum*, 46 Barb. 561 (N. Y. 1866), p. 569, "the aggrieved party has his election of remedies. He may remove the nuisance or he may have his action for the private damages sustained by him. He cannot have both remedies." So, as he has no right of ac-

comes to him a private nuisance. He may remove that which interferes with his right, to the extent necessary to the reasonable enjoyment of the right of which the thing interposed would deprive him, doing no unnecessary damage. A party, by erecting a nuisance, does not put himself, or his property, beyond the protection of the law. If an individual or member of the community can with reasonable care, notwithstanding the act complained of, enjoy the right of franchise belonging to him, he is not at liberty to destroy or interfere with the property of the wrongdoer.

In this case, whatever might have been proper had the plaintiffs been on trial upon an indictment for the nuisance, the requests of their counsel were proper, and the instructions should have been given to the jury as asked for.* The justification of the defendants was limited by the necessity of the case, and if the use of the road was not interfered with, the defendants were trespassers in removing the fence. The instructions asked were substantially the same as those given in *Renwick v. Morris*.

The judgment must be reversed, and a new trial granted; costs to abide the event.

BACON and MULLIN, Justices, concurred.

tion for a condition which threatens merely possible injury at some future time, he cannot abate it, *Gates v. Blincoe*, 2 Dana 158 (Ky. 1834); *Moffett v. Brewer*, 1 G. Greene 348 (Iowa 1848); *Toledo, St. L. & K. R. Co. v. Loop*, 139 Ind. 542 (1894); *Graves v. Shattuck*, 35 N. H. 257 (1857); *Priewe v. Fitzsimmons*, 117 Wis. 497 (1903), unless the condition or structure, though causing no immediate tangible loss or inconvenience, constitutes "an infringement of his right which might ripen into an easement," when, since an action would lie for nominal damages, the person whose right is infringed may enter and abate it, *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53 (1857); see also, the cases recognizing a general right in any member of a community to remove gates or fences erected by landowners across public rights of way over their lands, *Brake v. Crider*, 107 Pa. St. 210 (1884), *semble*. So, since, with certain exceptions no action lies against a vendee or lessee, who omits to remove a nuisance created by his vendor or lessor, until notice is given him to remove it, *Penruddock's case*, 5 Coke 101a (1597); *Johnson v. Lewis*, 13 Conn. 303 (1839), such a nuisance cannot be abated until such notice is given, *Jones v. Williams*, 11 M. & W. 176 (1843). But one, whose right as a member of the public to pass along highways, or navigate rivers or streams, is obstructed, is held entitled to remove the obstruction, yet the mere obstruction of such right is not of itself held sufficient private damage to support an action for damages.

*"The court was requested to charge, 1. That a mere encroachment on the road by the fence did not authorize the removal of the fence by the defendants, unless it hindered, impeded or obstructed the use of the road by the public; and 2d. That an encroachment of a fence upon the road is not a public nuisance, so as to authorize an individual to abate it, unless it interferes with the use of the road by the public."

"These instructions were refused, on the ground that it was not such a case; although there might be cases where persons might interfere with a mere encroachment, and that this amounted to an obstruction if it was within the limits of the highway as actually fenced and used. That the defendants had a right to the full width of the road as fenced and used, although they may have been able to get by the obstruction without any serious inconvenience. The plaintiffs had no right to narrow the road, and if they did put their fence in the road, the defendants could remove it, doing no unnecessary damage."

MORGAN, J. (dissenting.) By the common law, any encroachment or incumbrance upon the highway, by which it is rendered less commodious to the people, is a public nuisance, and may be abated without suit. (1 Haw. P. C. 212.) Every portion of the road, as laid out and used, is dedicated to the public and cannot be obstructed so as to interfere with the public travel over such portions, although there may be room to pass on the opposite side. (Id. 365. 16 Vin. Abr. tit. Nuisance, W.) There may be exceptions to this rule, but they have only been allowed in cases where the pretended obstructions were temporary, or the alleged encroachment was beneficial. It is upon this ground that ornamental trees are considered a public benefit, instead of an obstruction. But there is no allegation of benefit here, and by the finding of the jury the plaintiffs' fence was placed within the limits of the highway. It is now said that teams could have passed on the other side without difficulty, or at least the jury might have found so by their verdict. But this is not the test.

New trial granted.[†]

(d) Use of force necessary for the preservation of discipline.

PATTERSON v. NUTTER.

Supreme Judicial Court of Maine, 1886. 78 Maine Reports, 509.

EMERY, J. Free political institutions are possible only where the great body of the people are moral, intelligent and habituated to self-control, and to obedience to lawful authority. The permanency of such institutions depends largely upon the efficient in-

[†] In the following cases it is held that a public nuisance can only be abated by a private individual if he be specially injured or aggrieved, or is especially impeded in the exercise of his rights.

Obstructions in the highway not seriously interfering with the defendants' convenient use thereof or impeding his passage, *Clark v. Lake St. Clair &c. Ice Co.*, 24 Mich. 508 (1872); *Corihell v. Holmes*, 87 Maine 24 (1894); *Hopkins v. Crombie*, 4 N. H. 520 (1829), the structure removed, though not interfering with the convenient use of the highway, was an encroachment thereon, and, as such, was by statute declared to be a public nuisance; but see *Lancaster Turnpike Co. v. Rogers*, 2 Barr. 114 (Pa. 1845), where it was held that a landowner could remove an abandoned toll-house, built partly on her land and partly on an adjacent highway, though it did not appear that it interfered with her convenient use thereof.

Obstructions to navigation in navigable rivers and streams; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44 (1864), *semble*, a bridge company held to have no right to destroy another's bridge, though it obstructed navigation; *Gumbert v. Wood*, 146 Pa. St. 370 (1891); Shaw, C. J., in *Brown v. Perkins*, 12 Gray 89 (Mass. 1858); *Griffith v. Holman*, 23 Wash. 347 (1910), *semble*; *Watts v. Norfolk & W. R. Co.*, 39 W. Va. 196 (1894), p. 212, *semble*; *Larson v. Furlong*, 50 Wis. 681 (1881).

A building, a nuisance because injurious, in itself or as used, to the public peace, good order or morals, see cases cited in Notes 3 and 4 and see also *Bowden v. Lewis*, 13 R. I. 189 (1881); *Fields v. Stokley*, 99 Pa. St. 306 (1882); *Klinger v. Bicket*, 117 Pa. St. 326 (1887), *semble*. *Contra: Meeker*

struction and training of children in those virtues. It is to secure this permanency that the state provides schools and teachers. School teachers, therefore, have important duties and functions. Much depends upon their ability, skill and faithfulness. They must train as well as instruct their pupils. R. S., c. 11, § 97. The acquiring of learning is not the only object of our public schools. To become good citizens, children must be taught self-restraint, obedience, and other civic virtues.

To accomplish these desirable ends, the master of a school is necessarily invested with much discretionary power. He is placed in charge some times of large numbers of children, perhaps of both sexes, of various ages, temperaments, dispositions, and of various degrees of docility and intelligence. He must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn. He must make rules, give commands, and punish disobedience. What rules, what commands, and what punishments shall be imposed, are necessarily largely within the discretion of the master, where none are defined by the school board. In *State v. Pendergrass*, 2 D. & B. (N. C.) 365, (S. C. 31 Am. Dec. 416), it was said: "One of the most sacred duties of parents is to train up and qualify their children for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction, when he shall

v. *VanRensselaer*, 15 Wend. 397 (N. Y. 1836), individuals held entitled to tear down, during an epidemic of Asiatic cholera, a filthy and overcrowded tenement house.

Many of the earlier cases contain *dicta* following Blackstone's broad assertion of a right in any one to abate a public nuisance, but in every case the nuisance was abated by the municipal authorities, *Hart v. Albany*, 9 Wend. 571 (N. Y. 1832); *Rung v. Schoneberger*, 2 Watts 23 (Pa. 1833); *Harvey v. Dewoody*, 18 Ark. 252 (1856); or the thing abated was held to be no nuisance, *Gunter v. Geary*, 1 Cal. 462 (1851), note 1; *Graves v. Shattuck*, 35 N. H. 257 (1857); *Burnham v. Hotchkiss*, 14 Conn. 311 (1841); *Rogers v. Rogers*, 14 Wend. 131 (N. Y. 1835); *Low v. Knowlton*, 26 Maine 128 (1846).

In the following cases one specially aggrieved by a public nuisance may abate it; obstructions interfering with the convenient use of a highway, *James v. Hayward*, Cro. Jac. 184 (1630); *Hubbard v. Deming*, 21 Conn. 356 (1851); *Marcy v. Taylor*, 27 Ill. 634 (1858); *Corthell v. Holmes*, 88 Maine 376 (1896); *Pontiac & C. Plank Road Co. v. Hilton*, 69 Mich. 115 (1888); *Griffith v. McCullum*, 46 Barb. 561 (N. Y. 1866); *Dimmett v. Eskridge*, 6 Mumf. 308 (Va. 1819); *Goodsell v. Fleming*, 59 Wis. 52 (1883); and see *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180 (1875), where the plaintiff was held to have the right to pass over the platform of a street car, stopped so as to block the crossing, and the conductor had no right to resist her passage; or which interferes with the defendant's access to his abutting premises; obstruction to the defendant's navigation of a river or stream, *Philiber v. Matson*, 14 Pa. St. 306 (1850); *Beach v. Schoff*, 28 Pa. St. 195 (1857); *State v. Parrott*, 71 N. Car. 311 (1874); *Selman v. Wolfe*, 27 Tex. 68 (1863); *Larson v. Furlong*, 63 Wis. 323 (1885), excavation in street from which the water, collected therein, flowed upon the defendant's land, *State v. Smith*, 52 Wis. 134 (1881).

believe it to be just and necessary.¹ The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power.² The law has not undertaken to prescribe stated punishments for particular offenses, (by a pupil) but has contented itself with the general grant of the power of moderate correction, and has confided the graduation of punishments, within the limits of this grant, to the discretion of the teacher."

This power of moderate correction unquestionably includes corporal punishment. Authorities are not needed for this proposition. The subject was incidentally considered in *Stevens v. Fasset*, 27 Maine, 296, and it was declared by this court, through Judge Shepley, that personal chastisement was lawful in our schools, and was properly resorted to where milder means of restraint were unavailing. Indeed, the plaintiff's counsel does not question that personal chastisement has been the practice, and has often been

¹ As to the limits of the right of a parent, or one in *loco parentis*, to corporally punish his child, see *State v. Alford*, 68 N. Car. 322 (1873); *State v. Jones*, 95 N. Car. 588 (1886); *People v. Green*, 155 Mich. 524 (1909), with valuable note; *State v. Koonse*, 123 Mo. App. 655 (1907); *Clasen v. Pruhs*, 69 Nebr. 278 (1903); and see *Winterburn v. Brooks*, 2 Car. & Kirw. 16 (1846). In *Smith v. Slocum*, 62 Ill. 354 (1872), a father, as the head of a household, is held to have the right to employ the force necessary to preserve good order and propriety of his household, and may remove from the room a grown daughter who is quarreling with the servant and slandering her step-mother, and who, after being told to go to her room, refuses to do so.

No civil action for personal injury of any sort will lie by the child against his parent so long as the relation continues, *Hewlett v. George*, 68 Miss. 703 (1891); *Foley v. Foley*, 61 Ill. App. 577 (1895); *McKelvey v. McKelvey*, 111 Tenn. 388 (1903); all cases of assault for excessive and cruel discipline; *Roller v. Roller*, 37 Wash. 242 (1905), assault for rape by father. In *Fortinberry v. Holmes*, 89 Miss. 373 (1906), it was held that a woman to whom the child's mother gave it to support and treat "as her own" stood in *loco parentis*, and was not liable to an action by the child for chastising it, though the mother had given instructions that the child was not to be whipped. But the parent, if he exercises his rights improperly, may be punished criminally, cases cited *supra*, or be deprived of the custody and control of the child, *Cunningham's Case*, 61 N. J. Eq. 454 (1901).

In *Clasen v. Pruhs*, 69 Nebr. 278 (1903), it was held that where a child had been chastised by an aunt standing to her in *loco parentis*, she might maintain an action against such person after the relation had terminated; and in *Treschman v. Treschman*, 28 Ind. App. 206 (1901), a step-daughter successfully maintained an action against her step-mother.

² So Cockburn, C. J., says, in *Fitzgerald v. Northcote*, 4 F. & F. 656 (1865), p. 689, "A parent when he places his child with a schoolmaster, he delegates to him all his authority so far as it is necessary for the welfare of the child"; and see *Mansell v. Griffin*, L. R. 1908, 1 K. B. 160, per Walton, J., p. 169, holding that the fact that the school regulations, not known to her parent, forbade corporal punishment, did not make moderate punishment wrongful.

In *Lander v. Seaver*, 32 Vt. 114 (1859), p. 123, it is held that the schoolmaster "cannot be safely trusted with all a parent's authority, for he does not act from the instinct of parental affection."

As to the liability of the head of a religious community to whom the child's parent has, in common with the other parents in the community, surrendered her right of punishment, see *Donnelley v. Territory of Arizona*, 5 Ariz. 291 (1898).

declared to be lawful. He eloquently urges, however, that corporal punishment is a "relic of barbarism," that it has been abolished in the army and navy, and has been forbidden in many schools by school boards. He urges that the greater humanity and tenderness of this age should not tolerate it in any schools, and that the courts of this day should recognize it as a proper mode of school punishment. Whatever force this argument might have with legislatures or school boards, it should not move the court from the well established doctrine.

The extent of the school-master's discretion in the exercises of this power of personal chastisement, is the only question here; and upon this question we think the law is well and correctly stated in *Lander v. Seaver*, 32 Vt. 114, as follows: "A school-master has the right to inflict reasonable corporal punishment. He must exercise reasonable judgment and discretion, in determining when to punish and to what extent. In determining what is reasonable punishment, various considerations must be regarded, the nature of the offence, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size and strength of the pupil to be punished. Among reasonable persons much difference prevails as to the circumstances which will justify the infliction of punishment, and the extent to which it may properly be administered. On account of this difference of opinion and the difficulty which exists in determining what is a reasonable punishment, and the advantage which the master has, by being on the spot, to know all the circumstances, the manner, look, tone, gestures and language of the offender, (which are not always easily described) and thus to form a correct opinion as to the necessity and extent of the punishment, considerable allowance should be made to the teacher by the way of protecting him in the exercise of his discretion. Especially should he have this indulgence when he appears to have acted from good motives and not from anger or malice. Hence the teacher is not to be held liable on the ground of the excess of punishment, unless the punishment is clearly excessive, and would be held so in the general judgment of reasonable men. If the punishment be thus clearly excessive, then the master would be liable for such excess, though he acted from good motives in inflicting the punishment, and in his own judgment considered it necessary and not excessive;"* but

* He is equally liable if the punishment is inflicted without proper cause, *Anderson v. State*, 3 Head 455 (Tenn. 1859); *State v. Mizner*, 50 Iowa 145 (1878), child punished for not studying subjects which his parent had directed that he should not study; *State v. Vanderbilt*, 116 Ind. 11 (1888), child punished for not paying for school property destroyed by it, the regulation requiring such payment being held unreasonable, it being also intimated that a child may not be punished for carelessness, in which there is no purpose to do wrong, compare *Heritage v. Dodge*, 64 N. H. 297 (1886). *Morrow v. Wood*, 35 Wis. 59 (1874), child punished for acts outside of a teacher's jurisdiction, but a child may be punished for acts done outside the school, *Cleary v. Booth*, (1893) 1 Q. B. 465; *Bolting v. State*, 23 Tex. App. 172 (1887), where the acts directly tend to injure the school discipline, *Lander*

if there be any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt."⁴ The foregoing statement of the law is well supported by the authorities cited in the notes to that case, in 76 Am. Dec. 163.

Now comparing the judge's rulings in this case with the above clear exposition of the law, it will be seen that in one respect at least, there was error. It is true the master should be held to have exceeded his discretion and thus become liable as a trespasser, unless the punishment is clearly excessive; but the judge ruled that the punishment must be so clearly excessive "that all hands would at once say it was excessive." The correct rule holds the teacher liable if he inflicts a punishment which the general judgment of such men, after thought and reflection, would call clearly excessive. The rule given at the trial of this case, however, would permit a teacher to proceed in severity of punishment until it became so great as to excite the instant condemnation of all men, the stupid and ignorant as well as the rational and intelligent. Such a ruling is clearly wrong and there should be a new trial.

Exceptions sustained. New trial granted.

v. *Seaver*, 32 Vt. 114 (1859). The master has no right to punish a pupil who is ignorant of the reason for it, *State v. Misner*, *supra*.

⁴ Accord: *Sheehan v. Sturges*, 53 Conn. 481 (1885); *Cooper v. McJunkin*, 4 Ind. 290 (1840), with which compare *Vanvactor v. State*, 113 Ind. 276 (1887); *Commonwealth v. Randall*, 4 Gray 36 (Mass. 1855); *Haycraft v. Grigsby*, 88 Mo. App. 354 (1901); *Lander v. Seaver*, 32 Vt. 114 (1859), and see *Keit's case*, cited in 3 Salk. 47 (1692), and *Fitzgerald v. Northcote*, 4 F. & F. 656 (1856), and *Regina v. Hopley*, 2 F. & F. 202 (1860).

On the other hand, many cases hold that, like a parent, a schoolmaster is the sole judge as to, *Hentage v. Dodge*, 64 N. H. 291 (1886), the necessity for and the severity of the punishment, *Boyd v. State*, 88 Ala. 169 (1890); *Fox v. People*, 84 Ill. App. 270 (1899); *Commonwealth v. Seed*, 5 Clark 78 (Pa. 1850); *State v. Pendergrass*, 2 Dev. & B. 365 (N. Car. 1837); *State v. Jones*, 95 N. Car. 588 (1886), *semble*, and he is not answerable for errors of judgment, if he acts in good faith and without malice.

In *State v. Pendergrass*, 2 Dev. & B. 365 (N. Car. 1837), and *State v. Jones*, 95 N. Car. 588 (1886), it is held that punishment "which may seriously endanger life and limb, or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced of itself immoderate, as not only being unnecessary for, but inconsistent with the purpose for which correction is authorized," i. e., the future welfare of the child; and see 1 Hawk, P. C., 261, 473-4. In *Boyd v. State*, 88 Ala. 169 (1890), the use of such an instrument is regarded as evidence of malice, see *Commonwealth v. Seed*, 5 Clark 78 (Pa. 1850). So malice may be inferred from the excessive nature of the beating, *State v. Thornton*, 136 N. Car. 610 (1904).

In all jurisdictions it is an assault and battery to beat a pupil or son under pretext of duty, *State v. Long*, 117 N. Car. 791 (1895); or for spite, *Commonwealth v. Ebert*, 11 Pa. Dist. Rep. 199 (1901); or out of revenge, *State v. Thornton*, 136 N. Car. 610 (1904), or from caprice, anger or bad temper, *Brisson v. Lafontaine*, 8 Lower Can. Jur. 173 (1864); or to inflict a cruel punishment, *Marlsbury v. State*, 10 Ind. App. 21 (1833); *Hathaway v. Rice*, 19 Vt. 102 (1846).

The right of a master to correct his apprentice though denied in 1481, Anon., Y. B. 21 Edw. IV, 6, pl. 1, on the ground that he might have a writ of covenant for any misconduct, was allowed in the same year in Anon., Y. B. 21 Edw. IV, 53, pl. 17, accord: *Commonwealth v. Baird*, 1 Ashm. 267 (Pa. 1830), *semble*, but this right does not extend to the correction of ordinary

BROWN, HUSSEY AND ERITH v. HOWARD.

Supreme Court of the state of New York, 1817. 14 Johnson's Rep. 118.

The defendants in error brought an action, in the Court below, against the plaintiffs in error, for an assault and battery and false imprisonment on the high seas, on board the ship *Tea-plant*, on a voyage from Liverpool to New York. Brown, the master of the ship, pleaded not guilty, and *son assault demesne*, and the other two defendants, who were mates on board of the same vessel, pleaded not guilty, and justified that they acted by the orders of Brown, the master.

At the trial in the Court below, which was without a jury, five witnesses, who were seamen on board of the same vessel, testified on the part of the plaintiff below, also a seaman on board, that while it was blowing very hard, and the plaintiff and some other of the hands were engaged in hoisting and belaying the foresail, the captain took up a mallet, and after cursing at them, threatened to knock out their brains if they did not exert themselves more; that they were then ordered aft by the captain to hoist the mizzen staysail, who, having procured a rope about half an inch thick, violently struck the sailors, and attacked the plaintiff below, and gave him eight or ten blows with the rope; that the plaintiff below asked him what he meant by such conduct, whereupon the captain again attacked him, and struck him a number of blows, and then endeavored to force him to go aloft to slush the skysail mast, a thin spar where there was nothing to hold by but the mast itself, and where, from the roughness of the sea, a man could not go with safety; that the plaintiff below said that he had been so beaten that he could not hold on, and seized and clung to some part of the rigging, the captain still pulling him with violence, until he forced him away, and both, by the violence of the captain's effort, and the rolling of the ship, fell upon the deck, the captain upon the plaintiff; and, the other two defendants being present all this time, the second mate took the captain off from the plaintiff below, and the captain then ordered the two mates to tie the plaintiff below, hand and foot, which they did, and laid him on the quarter-deck; that the plaintiff remained bound in this manner, without the power of moving himself, exposed to the inclemency of the weather, in the month of March, for five days and nights, except during two nights, when the weather was so very bad that the captain ordered him to be put below; that after this the plaintiff below was asked by the captain if he would do his duty, to which, on replying in the affirmative, he was released, but was afterwards confined to his berth for some time by rheumatism, and that to relieve him the captain ordered one of the mates to apply some remedy to the part

hired servants, *Commonwealth v. Baird*, 1 Ashm. 267 (Pa. 1830); *Tinkle v. Dunivant*, 16 Lea 503 (Tenn. 1886).

affected, which was done accordingly. The justice gave judgment for the plaintiff below, for one hundred and twenty-five dollars.

Although a captain may have a right to inflict corporal punishment upon a seaman under his command, yet it is not an arbitrary and uncontrolled right: he is amenable to the law for the due exercise of it. He ought to be able to show, not only that there was a sufficient cause for chastisement, but that the chastisement itself was reasonable and moderate. (2 Bos. & Pull. 224. 3 Day's Rep. 285.) The rule on this subject is well laid down by Abbot. (On Shipping, 125.) By the common law, says he, the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters, relative to the navigation of the ship, and the preservation of good order; and, in case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner; his authority, in this respect, being analogous to that of a parent over a child, or a master over his apprentice, or scholar.¹ Such an authority is absolutely necessary to the safety of the ship, and of the lives of the persons on board; but it behooves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression.²

Not being able to discover, from the return, the least justification for the captain's treatment of the plaintiff below, and the

¹ The master's power is not co-extensive with that of the parent or even the schoolmaster, he can only punish for faults, which relate to the duties of the seaman as such, or which tend to subvert the discipline of the ship, but not for general immoralities or improper conduct though tending to injure the discipline of the crew of another ship, *Bangs v. Little*, 1 Ware 520 (1839).

² The force must be shown to be clearly excessive, *Butler v. McLean*, 1 Ware 220 (1832); *Benton v. Whitney*, 1 Crabbe 417 (1841), for the reasons which require that the master shall have a wide discretion as to when and how to use violence to maintain discipline, see Ware J. in *Bangs v. Little*, 1 Ware 520 (1839), and Hopkinson J. in *Benton v. Whitney*, 1 Crabbe 417 (1841). In *Forbes v. Parsons*, Crabbe 283 (1839), Hopkinson J. says, p. 288, that recovery should be allowed "first, when personal violence was inflicted upon him, although not excessively, wantonly and without any provocation or cause; second, when provocation and cause were given by the seaman but the punishment was cruel and excessive, having no reasonable proportion to the provocation or fault for which it was inflicted; third, I have always looked with a severe eye to the instrument used in punishing." A rope, he regards as the proper punishment, the fist barely permissible, while the use of a handspike, bludgeon, sword, or other deadly weapon, when there is no appearance of mutiny, *Scheller v. York*, 1 Crabbe 449 (1841), or stamping upon the seaman when prostrate, are said to be clearly improper. But when there is cause and a proper instrument is used, he says, "I cannot institute a nice or scrupulous comparison between the offense of the sailor and the number or violence of the blows inflicted upon him for it."

A sailor may be corporally chastised as well as imprisoned in punishment for a past offense, *The Lowther Castle*, 1 Hagg. Adm. 384 (1825); *Michaelson v. Dennison*, 3 Day 294 (1808); *City of Mobile*, 116 Fed. 212 (1902), though in *Padmore v. Pilts*, 44 Fed. 104 (1890), it was held that a sailor may not be punished for insubordination, the ship being in a civilized port. Except under exceptional circumstances requiring immediate action, punishment should not be inflicted without inquiry and hearing the

mates having been acquainted with the whole transaction, I can perceive no ground upon which they can be exonerated as parties, nor, of course, admissible as witnesses. The judgment below must, accordingly, be affirmed.

Judgment affirmed.

sailor in his own defense, *The Agincourt*, 1 Hagg. Adm. 271 (1824); *Murray v. Moutrie*, 6 C. & P. 471 (1834).

The master of a vessel has the right to use force to preserve decent discipline among its passengers, and may imprison a disorderly passenger, *Boyce v. Bayliffe*, 1 Camp. 58 (1807), but he may not do so merely because such passenger shows him disrespect, *King v. Franklin*, 1 F. & F. 360 (1858), passenger, during a dispute in regard to playing cards, called the captain "the landlord of a floating hotel"; *Aldworth v. Stewart*, 4 F. & F. 957 (1866), passenger assaulted and imprisoned for putting his fingers to his nose at the captain in the course of a complaint in regard to the character of the food furnished.

Part 2.

Acts Harmful to Others Excused Because Freedom of Action or the Act is Regarded as of Social Benefit.

CHAPTER I.

Conduct Excused Because of the Necessity of Preserving the Independence of the Sovereign in Its Dealings With Other Nations.

UNDERHILL *v.* HERNANDEZ.

United States Court of Appeals, 1897. 168 U. S. 250.

Hernandez was in command of a revolutionary army in Venezuela when an engagement took place with the government forces which resulted in the defeat of the latter, and the occupation of Bolivar by the former. Underhill was living in Bolivar, where he had constructed a waterworks system for the city under a contract with the government, and carried on a machinery repair business. He applied for a passport to leave the city, which was refused by Hernandez with a view to coerce him to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces. Subsequently a passport was given him. The revolutionary government under which Hernandez was acting was recognized by the United States as the legitimate government of Venezuela. Subsequently Underhill sued Hernandez in the Circuit Court for the Second Circuit to recover damages caused by the refusal to grant the passport, for alleged confinement of him to his own house, and for alleged assaults and affronts by Hernandez' soldiers. Judgment being rendered for defendant the case was taken to the Circuit Court of Appeals, where the judgment was affirmed. Thereupon the case was brought to this court on certiorari.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such

acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact. Where a civil war prevails, that is, where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military force, generally speaking foreign nations do not assume to judge of the merits of the quarrel. If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation. If the political revolt fails of success, still if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability. *United States v. Rice*, 4 Wheat. 246; *Fleming v. Page*, 9 How. 603; *Thorington v. Smith*, 8 Wall. 1; *Williams v. Bruffy*, 96 U. S. 176; *Ford v. Surgett*, 97 U. S. 594; *Dow v. Johnson*, 100 U. S. 158; and other cases.¹

CHAPTER II.

Conduct Excused When Necessary to Secure the Proper Administration of Justice.

SECTION 1.

Immunity of the Judiciary.

Glanville—Book 8, Chapter 9—(Ca. 1,200) Beame's Edition, p. 210.

"If any one should declare against the Court for passing a false Judgment, and, therefore false, because when one party had said thus, and the other answered thus, the Court in question had judged falsely of their allegations by deciding in such words, and that the Court had given such false Judgment by the mouth of N.; and, if he were disposed to deny the present

¹"The transactions of independent states between each other are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision that they make," *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 13 Moo. P. C. 22 (1859), p. 75, "The appeal is to the sword and to almighty Justice, and not to courts of law or equity. In the exercise of sovereign right, the sovereign is sole arbiter of his own justice. The penalty of wrong is war and subjugation."—Johnson, J. in *Cherokee Nation v. Georgia*, 5 Peters 1 (U. S. 1831), p. 28.

Nor can a foreign subject maintain an action against an official for acts

charge, the other was prepared to prove it against him, chiefly by such proper witness, who was ready to enter upon the proof. Thus may the matter, and that very properly, be decided by the Duel.¹ But, whether such Court is obliged to defend itself by one of its own members, or may have recourse to a stranger, may be questioned?"

ANDERSON v. GORRIE.

Court of Appeal, 1894. 1895 Law Reports, 1 Queen's Bench Div. 668.

LORD ESHER, M. R. In this case an action was brought by the plaintiff against several judges of the Supreme Court of a colony for damages for wrongful acts done by them in committing him for contempt of Court, and in holding him to excessive bail.

The defendants were judges of a Supreme Court in a colony, and the first question is whether these matters were matters with which they had jurisdiction to deal. As to the contempt of Court, it cannot be denied that they had jurisdiction to inquire whether a contempt had been committed, and, further, it cannot be denied that they had power to hold a person to bail in the cases provided for by the colonial statute which expressly gives that power. These two matters were obviously within the jurisdiction of the Court. No one can doubt that if any judge exercises his jurisdiction from malicious motives he has been guilty of a gross dereliction of duty; but the question that arises is what is to be done in such a case. In this country a judge can be removed from his office on an address by both Houses of Parliament to the Crown. In a colony such an address is not necessary. The governor of the colony represents the Sovereign, and over him is the Secretary of State for the Colonies, who represents Her Majesty and can direct the removal of the judge. But the existence of a remedy would not in either of these cases of itself prevent an action by a private person; so that the question arises whether there can be an action against a judge of a Court of Record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie. The ground alleged from the earliest times as that on which this rule

injurious to him, if the official's action is done under the antecedent command of his government or is ratified by its subsequent approval and adoption, *Ruan v. Perry*, 3 Caines, 120 (N. Y. 1805); *Durand v. Hollins*, 4 Blatchf. 451 (Dist. Ct. U. S. 1860), property destroyed in bombardment of Greytown, Nicaragua; *Buron v. Denman*, 2 Exch. 167 (1848).

The Privy Council have regarded the dealings of the East India Company, and the Indian Empire as its successor, with independent native states and their subjects as within this principle, *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 13 Moo. P. C. 22 (1859).

¹"The liberty of falsifying a Judgment was allowed by the Assises of Jerusalem. But the person, availing himself of this dangerous privilege, seems to have been obliged to fight all the persons composing the Court, not merely the Judges, but the Suitors, one after the other. Under these circumstances, the privilege would, probably, not often be claimed. (Assis. de Jerusalem, c. 111.)"

rests is that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice. That is the ground stated in *Miller v. Hope*, 2 Shaw Sc. App. Cas. 125, in the year 1824, by Lord Gifford by his judgment in the House of Lords; and in 1892, in *Haggard v. Pelicier Frères*, (1892) A. C. 61, at p. 68, Lord Watson says: "It is due to the appellant to state that the respondents in their pleadings make no imputation of dishonesty, although their Lordships do not mean to suggest that such an imputation, if it had been made and proved, would have deprived him of the immunity which the law accords to a judge in his position." Crompton J. in *Fray v. Blackburn*, 3 B. & S. 576, at p. 578, said: "It is a principle of our law that no action will lie against a judge of one of the superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly. * * * The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions."

The reasons for the rule were more fully stated by Kelly C. B. in *Scott v. Stansfield*, Law Rep. 3 Ex. 220. If a judge goes beyond his jurisdiction a different set of considerations arise. The only difference between judges of the Superior Courts and other judges consists in the extent of their respective jurisdiction.¹ It follows from what I have said that, taking the findings of the jury to be true to the fullest extent, the action will not lie against the defendant, and the appeal must be dismissed.

KAY, L. J. I am of the same opinion. I take the law to be clear that for an act done by a judge in his capacity of judge he cannot be made liable in an action, even though he acted maliciously and for the purpose of gratifying private spleen. It cannot be denied that all the acts complained of were done by the defendant in his capacity of judge, and whether he acted rightly or wrongly cannot be questioned in this action. Agreeing entirely with what the Master of the Rolls has said, and with the judgment of Kelly C. B. in *Scott v. Stansfield*, Law Rep. 3 Ex. 220, I come to the conclusion that this action will not lie.²

Appeal dismissed.

¹ "There is a marked distinction between courts of general jurisdiction and inferior tribunals having only a special or limited jurisdiction. In the former case, the presumption of law is that they had jurisdiction until the contrary is shown; but with regard to inferior courts and magistrates, it is for them, when claiming any right or exemption under their proceedings, to show affirmatively that they acted within the limits of their jurisdiction." —Bigelow, J. in *Piper v. Pearson*, 2 Gray 120 (Mass. 1854); *Lund v. Hennessey*, 67 Ill. App. 233 (1896), but see *Wright v. Hasen & Gordon*, 24 Vt. 143 (1852).

² *Accord*: Lib. Ass. 27 Ed. III, p. 18 (1352); Y. B. 9 Hen. VI, 60, pl. 9 (1430); Y. B. 9 Edw. IV, 3 pl. 10 (1469); 27 Edw. VI, 67, pl. 49 (1572); *Floyd v. Barker*, 12 Coke 23 (1608); *Hammond v. Howell*, 2 Mod. 218 (1688), cited in *Yates v. Lansing*, 5 Johns. 282 (N. Y. 1810), by Kent, C. J.; *Fray v. Blackburn*, 3 B. & S. 576 (1863); *Bradley v. Fisher*, 13 Wall. 335 (U. S. S. C. 1871); *Woodruff v. Stewart*, 63 Ala. 206 (1879); *Borden v.*

MC CREADIE v. THOMSON.

Court of Session, 1907. 1907 Session Cases, 1176.

LORD JUSTICE-CLERK.—This case raises a question of much importance. The pursuer asks for damages from a Magistrate sitting in a summary Court on the ground that he sentenced her to imprisonment without the option of a fine, under a complaint based upon a clause of a statute which did not empower him to pronounce a sentence of imprisonment except as an alternative to the nonpayment of a pecuniary penalty, the prayer of the complaint being in terms of the statute. She alleges that although it was pointed out by the clerk as the Court's assessor that such a sentence could not be pronounced, he insisted on inflicting it, on the view that he could deal with the matter, not as it was charged in the complaint, but as constituting an offence at common law, viz., a breach of the peace,

State, 11 Ark. 519 (1851); *Hughes v. McCoy*, 11 Colo. 591 (1888); *Elmore v. Overton*, 104 Ind. 548 (1885), *semble*; *Harrison v. Redden*, 53 Kans. 265 (1894), where a judge was accused of having notified a defendant of the plaintiff's intention to sue for alimony and having advised him to leave the jurisdiction; *Stewart v. Cooley*, 23 Minn. 347 (1877), *semble*; *Yates v. Lansing*, 5 Johns. 282 (N. Y. 1810); *Lange v. Benedict*, 73 N. Y. 12 (1878); *Ross v. Rittenhouse*, 2 Dall. 160 (Pa. 1792), 1 Yeats 443 (Pa. 1795); *Brodie v. Rutledge*, 2 Bay 69 (S. Car. 1796); *Cope v. Ramsey*, 2 Heisk. 197 (Tenn. 1870.) This privilege extends to "every judge, whether of a higher or lower court, exercising the jurisdiction vested in him by law," Shaw, C. J., *Pratt v. Gardner*, 2 Cush. 63 (Mass. 1848), including justices of the peace, magistrates, etc., *Cunningham v. Dilliard*, 4 Dev. & B. 351 (N. Car. 1839); *Pepper v. Mayes*, 81 Ky. 673 (1884); *Fausler v. Parsons*, 6 W. Va. 486 (1873); *Reid v. Hood*, 2 N. & McC. 168 (S. Car. 1819); *Lund v. Hennessey*, 67 Ill. App. 233 (1896); *Sorensen v. Wellman*, 69 Kans. 637 (1904); *Tylor v. Alford*, 38 Maine 530 (1854); *Curnow v. Kessler*, 110 Mich. 10 (1896); *Stone v. Graves*, 8 Mo. 148 (1843); *Burnham v. Stevens*, 33 N. H. 247 (1856); *Handshaw v. Arthur*, 161 N. Y. 664 (1900); *Hanna v. Stevin*, 8 Pa. S. C. 509 (1898); *Hoggatt v. Bigley*, 6 Humph. 236 (Tenn. 1845); *Gaines v. Newbrough*, 12 Tex. Civ. App. 466 (1896); *Cooke v. Bangs*, 31 Fed. 640 (1887), compare *Yates v. Lansing*, 5 Johns. 282 (N. Y. 1810).

While for a time it seemed to be doubtful whether British judges of courts not of record were liable for malicious or corrupt exercise of their judicial powers, Clerk & Lindsell on Torts, 6th ed. (1912), pp. 808-809, a consular court, which was not a court of record, was held entitled to protection equal to that given such courts, *Haggard v. Pelicier Frères*, L. R. 1892 A. C. 61. Some American jurisdictions lay down the rule that a Justice of the Peace or other inferior judge, is not liable *unless* he acts maliciously or corruptly, *Baker v. Morgan*, 5 Ky. L. 323 (1883); but see *Pepper v. Mayes*, 81 Ky. 673 (1884); *Gault v. Wallis*, 53 Ga. 675 (1875); *Heath v. Halfhill*, 106 Iowa 131 (1898); *Knell v. Briscoe*, 49 Md. 414 (1878); while in *Stewart v. Cooley*, 23 Minn. 347 (1877), it is held while the motives which prompt the judicial action of a judge are immaterial, he may be liable for participating in a conspiracy with a suitor to injure the plaintiff by the abuse of his judicial function.

As to the immunity of public officers, as such exercising quasi-judicial functions, such as tax assessors or selectmen appraising property for taxation, *Weaver v. Devendorf*, 3 Denio 117 (N. Y. 1846); *Fawcett v. Dole*, 67 N. H. 168 (1891); *Stearns v. Miller*, 25 Vt. 20 (1852), or dividing among churches the rents from land, granted for their use, *Univ. Soc. v. Leach*, 35 Vt. 108 (1862), a city council awarding contracts, *East River, etc., Co. v. Donnelly*, 93 N. Y. 557

for which he had by law the power to pronounce a sentence of imprisonment as a direct punishment. That he erred in this cannot be doubted, and that consequently he acted outwith and in excess of his jurisdiction is equally plain. The question now before the Court is whether an action of damages can be competently and relevantly raised against him in these circumstances.

We had the advantage of a very able and full argument from the Bar, the one party alleging that a Judge sitting as the defender did is immune from all action at law for damages for anything done by him when sitting in his judicial capacity; the other party maintaining that while such immunity from attack in a Court of law applies to Judges of superior jurisdiction, there is no law to the effect that inferior Magistrates may not be called upon to make reparation where they have gone outside their powers and inflicted a wrong.

Upon the question of immunity of the Judges of the Supreme Court there can be no doubt. The principle is clear and the decisions are emphatic. The principle is that such Judges are the King's Judges directly, bound to administer the law between his subjects and even between his subjects and himself. To make them amenable to actions of damages for things done in their judicial capacity, to be dealt with by Judges only their equals in authority and by juries, would be to make them not responsible to the King, but subject to other considerations than their duty to him in giving their decisions, and to expose them to be dealt with as servants not of him but of the public.

(1883), a superintendent of a State Insane Asylum determining that a person should be detained as dangerously insane, *Van Deusen v. Newcomer*, 40 Mich. 90 (1879), a surveyor general revoking the commission of a deputy, *Reed v. Conway*, 20 Mo. 22 (1854), a superintendent of schools refusing to issue a teacher's license, *Elmore v. Overton*, 104 Ind. 548 (1885), see *Donahoe v. Richards*, 38 Maine 379 (1854), there is a conflict of authority, in *Weaver v. Devendorf* and *East River Co. v. Donnelly*, their immunity is held to be as complete as that of judges; in *Van Deusen v. Newcomer*, they are held not liable for "acts done understandingly and in good faith"; in *Fawcett v. Dole*, assessors are said not to be liable "for errors of judgment, unintentional mistakes, irregularities or illegalities in the assessment"; in *Reed v. Conway*, they are held liable only if they act maliciously or corruptly, see *Pepper v. Mayes*, 81 Ky. 673 (1884), and *Elmore v. Overton*, and *Donahoe v. Richards*, where, though it is said that their functions are not judicial but administrative, liability is held to depend on proof of malice or corrupt motives; while in *Stearns v. Miller* and *Univ. Soc. v. Leach*, they are held liable for injurious errors due to fraud, malice, or "want of common care and skill." As to the liability of officials given by statute the power to destroy property if it be harmful to the public, as horses having glanders, etc., or Boards of Health empowered to destroy property endangering the health of the community or of officers obeying their orders, compare *Miller v. Horton*, 152 Mass. 540 (1891) and *Pearson v. Zehr*, 138 Ill. 48 (1891) with *Raymond v. Fish*, 51 Conn. 80 (1883) and *Valentine v. Englewood*, 76 N. J. L. 509 (1908).

As to the liability of election officers for refusing to receive the vote of a qualified voter, compare *Morgan v. Dudley*, 18 B. Mon. 693 (Ky. 1857), *Bevard v. Hoffman*, 18 Md. 479 (1862), holding that they are liable only if they do so maliciously or from corrupt motives, with *Lincoln v. Hapgood*, 11 Mass. 350 (1814), where a mere refusal is, without more, held to entail liability.

Accordingly the remedy in this case, if they flagrantly offend against duty, is not by proceedings in any Court, but only by addresses to the Crown from the Houses of Parliament. Between their position and that of Judges appointed not by the King but by the community or some authority in the community not having the kingly prerogative, but only acting by a delegated authority for local administration as in the case of Justices of the Peace appointed by the Lord Chancellor, there is no analogy. Therefore any claim for immunity for acts done in local summary Courts cannot be based on the fact of the immunity of the Supreme Court Judges. That the highest Courts of justice are designated "Supreme Courts" of itself indicates the distinction. The Supreme Courts have power to right wrongs done in the inferior Courts, their jurisdiction being universal, and their duty being to see justice done throughout the land. The other Courts have no jurisdiction beyond their own border, and cannot review the conduct of any other Judge within their border.

Is there, then, any immunity attaching to the Judges of the inferior Courts for their actings when sitting in judgment? Certainly there is. They cannot be made amenable for words used, however severely they may comment on the conduct of individuals, provided such words are uttered where acting in the exercise of their magisterial functions. Of this the case at *Waterston*, 4 F. 783, is the latest and most emphatic instance.

But while this is so, it is a totally different question whether a Magistrate who when sitting as such does official acts which he has no power to do under a statute in accordance with which he is bound to act, and which judicial acts have the effect of restraining the liberty of the subject, and subjecting him to penalty in his person, is immune from civil consequences for the wrong he has done. I do not think that this has ever been held, and the opposite has been held in many cases. Where a Magistrate professing to sit as such, and dealing with a case which he has no jurisdiction to deal with at all, commits what is an undoubted wrong upon a citizen, both by principle and practice he is held liable for the wrong done. If that is so, can it be said that a Magistrate who has before him a case which he can competently try under an Act of Parliament on which the complaint is founded, and who, instead of dealing with the case as it is before him, and on conviction awarding such punishment as the Act prescribes and allows, proceeds knowingly to pronounce a sentence which is not competent under the Act of Parliament, and thereby sends a person to prison contrary to the Act of Parliament,—I say, can it be said that he is in any more favorable position than a Magistrate trying a case in circumstances where he has no jurisdiction? In the one case his sentence is illegal, because he has no complaint before him on which he can pronounce a sentence at all. In the other he has a complaint before him, on which he cannot pronounce the sentence which he does pronounce. The wrong is as great in the latter case as in the former. For as well might he have no jurisdiction at all as step outside the jurisdiction which he does possess, to do something which he could not do if he held him-

self within the limits prescribed to him by the law under which he was called to exercise his jurisdiction. The case of *Groome v. Forrester*, 5 Maule & Selwyn, 314, decided in England, is a forcible illustration of the fact that there may be liability in a Magistrate, not merely for acting without jurisdiction, but for doing an act in excess of the jurisdiction he was called upon to exercise. In that case, as here, the Magistrate could have pronounced an effective judgment, under which incarceration might have taken place. The mistake made was that while the thing complained of was that an overseer had refused to obey an order of the Court by delivering up a certain book, he was committed till he should have delivered up "all and every, the books," &c. In that case the Magistrates were held liable in damages for "a clear excess of jurisdiction."

Here I think it is necessary to draw a distinction. It is where the error committed by the inferior Magistrate takes effect that his liability to answer for the wrong done arises. It is not for what he has ordered, but for what he has caused another to suffer that he is amenable to the law. That he has pronounced an illegal sentence is not sufficient to subject him in damages if nothing has been done upon it. But when it has been carried out so that the wrong has been made effective, then he may be answerable. This is illustrated by the English case, *Barton v. Bricknell*, 13 Q. B. (Ad. & El. N. S.) 393, where an illegal sentence ordering confinement in the stocks was pronounced, but was not carried out, so that the wrong was not suffered. Accordingly it was held that no claim for damages could be sustained.

It only remains to be seen whether, under the legal decisions which have been pronounced, it can be held that in such a case as the present, in which a Magistrate sitting in a Police Court has pronounced a sentence of imprisonment for a term, without the option of a fine, where he had no jurisdiction to do so, he is free from any action. I am unable to find, after an examination of the cases quoted in the debate, that they lead to any such conclusion. One other case was referred to in reply by the reclamer—that of *Anderson v. Gorrie*, L. R. (1895) 1 Q. B. 668. That case also has no bearing, being the case of a Supreme Court Judge of a colony, and it was held that his position was analogous to that of a Supreme Court Judge in this country, and that he could not be sued for an act done in his capacity as Judge, whether he acted rightly or wrongly.

On the question whether in this case it is necessary to aver specific malice, and to put malice in issue, I concur with the Lord Ordinary that the case being one in which the wrong complained of was an entirely *ultra vires* act by the magistrate, it is not necessary for the pursuer to prove malice. I adopt the words of Lord Pitmilley, who said in a similar case, (*Strachan v. Stoddart*, 7 S., at p. 6)—"It is no matter whether it was from error or malice, if . . . grossly illegal and irregular, the party is entitled to claim damages alike from the private party and the judge."¹

¹ Accord: *Crepps v. Durden*, 2 Cowp. 640 (1777); *Burlingham v. Wylee*, 2 Root 152 (Conn. 1794); *Lanpher v. Dewell*, 56 Iowa 153 (1881); *Sheldon v.*

HOULDEN v. SMITH.

Court of Exchequer, 1850. 14 Adolphus & Ellis (N. S.) 841.

PATTERSON, J. This was an action for trespass and false imprisonment against the defendant, the judge of the county court in Lincolnshire. The defendant pleaded Not guilty, but not saying "by statute;" also a plea of want of notice of action; but the notice was proved at the trial. The facts appear to be that the plaintiff, being resident in Cambridgeshire, was sued in the county court at Spilsby in Lincolnshire by special order of the defendant under the 60th section of stat. 9 & 10 Vict. c. 95. The plaintiff was served with the summons in Cambridgeshire, and not appearing, judgment was given against him by default at the court at Spilsby on the 18th of August, 1847. A judgment order was served on the plaintiff in Cambridgeshire on the 25th of August. A warrant against the goods of the plaintiff within the jurisdiction of the Spilsby court was issued on the 14th of September, which was transmitted, under the 104th section of the Act, (see stat. 15 & 16 Vict. c. 54, s. 5.) to the county court in Cambridgeshire, and returned "no effects." So far the proceedings were all regular. On the 21st of September a summons was issued by order of the defendant, calling on the plaintiff to appear at the Spilsby court on the 7th of October, and be examined as to his not paying the debt and costs, and as to his estate and effects. This summons was without jurisdiction; for the section, 98, which authorizes the issuing such summons, directs it to be issued by the county court within the limits of which the party shall *then* dwell or carry on his business; which in this case was the county seat at Cambridgeshire; for in that county only the plaintiff dwelt and carried on his business during the whole of these proceedings. This summons was served on the plaintiff in Cambridgeshire on the 27th of September. On the 7th of October the plaintiff did not appear at the county court at Spilsby; and, the service of the last summons having been proved, the defendant, as judge of the court, believing that he had power and authority to do so, made a minute in the minute book of the court, whereby it was ordered that the plaintiff should, for contempt in not attending, be committed to

Hill, 33 Mich. 171 (1876); *Estopinal v. Peyroux*, 37 La. Ann. 477 (1885); *Patzack v. Von Gerichten*, 10 Mo. App. 424 (1881); and see *Kennedy v. Barnett*, 64 Pa. 141 (1870), *semble*.

Contra: *Austin v. Vrooman*, 128 N. Y. 229 (1891); *Handshaw v. Arthur*, 9 App. Div. 175 (N. Y. 1896), 161 N. Y. 664 (1900); *Sorensen v. Wellman*, 69 Kans. 637 (1904); *Curnow v. Kessler*, 110 Mich. 10 (1896); *Comstock v. Eagleton*, 11 Okla. 487 (1902), holding that where a justice of the peace or other inferior judicial officer of limited jurisdiction has jurisdiction of the subject matter and person, he is no more liable than a judge of a superior court is liable though his action is in excess of the powers conferred upon him by statute or is expressly forbidden thereby, *Bradley v. Fisher*, 13 Wall. 335 (U. S. 1871); *Yates v. Lansing*, 5 Johns. 282 (N. Y. 1810); *Hughes v. McCoy*, 11 Colo. 591 (1888); *Robertson v. Parker*, 99 Wis. 652 (1898); *cf. Heller v. Clarke*, 121 Wis. 71 (1904); see *Cooke v. Bangs*, 31 Fed. 640 (1887), and *Robertson v. Hale*, 68 N. H. 538 (1896).

Cambridge gaol for fourteen days. A warrant was made out accordingly; and he was so committed.

That this commitment was without jurisdiction is plain; that the defendant ordered it under a mistake of the law and not of the facts is equally plain; for it is impossible that he could be ignorant that the plaintiff dwelt and carried on his business in Cambridgeshire, the service of all the processes having been proved to have been made there, and the defendant having originally specially allowed the plaint to be made in his court, within the jurisdiction of which the cause of action accrued, the defendant (the now plaintiff) residing in Cambridgeshire. This case is not therefore within the principle of *Lowther v. The Earl of Radnor*, 8 East, 113, 119, or *Gwinne v. Poole*, 2 Lutw. Appendix, 1560, 1566, where the facts of the case, although subsequently found to be false, were such as, if true, would give jurisdiction, and it was held that the question as to jurisdiction or not must depend on the state of facts as they appeared to the magistrate or judge assuming to have jurisdiction.¹ Here the facts of the case, which were before the defendant and could not be unknown to him, showed that he had no jurisdiction; and his mistaking the law as applied to those facts cannot give him even a prima facie jurisdiction, or semblance of any. The only questions, therefore, are, whether the defendant is protected from liability at common law, being and acting as the judge of a court of record, in which case the plea of Not guilty would be sufficient; or whether he is protected by the provisions of any statute, and if so, whether he can take advantage of such statute, having omitted the words "by statute" in his plea and the margin of it.

As to the first question, although it is clear that the judge of a court of record is not answerable at common law in an action for an erroneous judgment, or for the act of any officer of the court wrongfully done, not in pursuance of, though under color of, a judgment of the court, yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when he has no jurisdiction. Here the defendant had not only no jurisdiction to commit the plaintiff to the gaol of Cambridgeshire, but he had no jurisdiction to summon him to show cause why he had not paid the debt. The summons ought to have been issued out of the county court of Cambridge.

We cannot therefore hold that the defendant in this case is protected from liability at common law.

Is he then protected by any statute? We find no statute which gives such protection. The statutes of 21 Ja. 1, c. 12, s. 5, and 42 G. 3, c. 85, s. 6, enable the defence, when it exists, to be given in evidence under the general issue, but they do not protect a party acting without jurisdiction; and now even that privilege of pleading the

¹ Accord: *Cave v. Mountain*, 1 Man. & Gr. 257 (1840); *Calder v. Halket*, 3 Moore P. C. Cases 28 (1839); *Pike v. Carter*, 3 Bing. 78 (1825), *aliter* where the court has means of knowledge of which he should have availed himself; see *The Case of Marshalsea*, 10 Coke 68 b. as explained by Powel B. in *Gwinne v. Poole*.

general issue only is coupled with this qualification, that the plea must be stated to be "by statute," which words are omitted here.

The judgment must therefore be for the plaintiff.

Judgment for plaintiff.²

GROVE v. VAN DUYN.

Court of Errors and Appeals, 1882. 44 N. J. L. 654.

On error to the Middlesex Circuit.

This was an action for trespass for assault and unlawful imprisonment. The defendant, Cornelius Van Duyn, pleaded the general issue of not guilty to the declaration, which was in its usual form in trespass, for assault and unlawful imprisonment.

The defendant Charles L. Stout also pleaded the general issue to the said declaration, and gave notice of special matter in evidence under said plea, setting up that he was one of the justices of the peace of the county of Middlesex, and that the following complaint was made before him by Cornelius Van Duyn:

State of New Jersey, Middlesex county, ss.—Cornelius Van Duyn, administrator of Samuel Van Tilburgh, deceased, of the township of Franklin, county of Somerset, upon his oath complains that on the 1st day of December, 1879, at the township of South Brunswick, in the county of Middlesex, Simeon P. Grove, William H. Grove, Jr., and Jediah Higgins, with force and arms, did enter upon the lands of Samuel Van Tilburgh, deceased, and with force and arms did unlawfully carry away about four hundred bundles of cornstalks, to the value of \$8, and were engaged in carrying other cornstalks from said lands of said Van Tilburgh, deceased; and therefore he prays that the said Simeon P. Grove, William H. Grove, Jr., and Jediah Higgins may be apprehended and held to answer said complaint and dealt with as law and justice may require.

C. VAN DUYN,
Administrator.

Sworn and subscribed before me this 1st day of December, 1879.

CHAS. L. STOUT,
Justice of the Peace.

Stout, as such justice, thereupon issued his warrant in the ordinary form, directing the said two persons and the said Higgins to

² *Accord: Terry v. Huntington*, Hard. 480 (1668); *Smith v. Bouchier*, 2 Strange 993 (1731); *Wingate v. Waite*, 6 M. & W. 739 (1840); *Ely v. Thompson*, 3 A. K. Marsh. 70 (Ky. 1820); *Piper v. Pearson*, 2 Gray 120 (Mass. 1854); *Selby v. Platts*, 3 Chand. 183 (Wis. 1851); *Woodward v. Paine*, 15 Johns. 493 (N. Y. 1818); *Mitchell v. Galen*, 1 Alaska 339 (1901); *Craig v. Burnett*, 32 Ala. 728 (1858); *Russell v. Perry*, 14 N. H. 152 (1843); *Clark v. Holmes*, 1 Dougl. 390 (Mich. 1844); *Call v. Pike*, 66 Maine 350 (1876); and *McVea v. Walker*, 11 Tex. Civ. App. 46 (1895), both cases where the magistrate was disqualified by reason of relationship to one of the parties; *Morgan v. Allen*, 27 N. Car. 156 (1844), value of matter in controversy exceeded that over which justices had jurisdiction; but see *Young v. Herbert*, 2 N. & McC. 172 (S. Car. 1819); *Morrill v. Thurston*, 46 Vt. 732 (1874); *Vaughn v. Congdon*, 56 Vt. 111 (1883), arrest on a warrant issued upon a complaint showing on its face that the statute of limitation had run on the offense charged.

be brought before him to answer the said complaint; and such three persons having been arrested by a constable, on such warrant, and being brought before such justice, and having waived on examination, were by him committed to the jail of the county for the cause mentioned in the complaint, to await the action of the next grand jury. Having given bail the next day the persons so arrested were discharged, and thereupon one of them, William H. Grove, Jr., brought this suit in trespass for the above-mentioned imprisonment. At the trial the plaintiff was nonsuited, and to review that judgment this writ of error was brought.

For the plaintiff in error, *A. V. Schenk* and *E. T. Green*.

For the defendants in error, *J. H. Stewart*.

The opinion of the court was delivered by

BEASLEY, C. J. Most of the general principles of law pertaining to that branch of this controversy which relates to the alleged liability of the defendant in this suit, who was a justice of the peace, are so completely settled as not to be open to discussion. The doctrine that an action will not lie against a judge for a wrongful commitment, or for an erroneous judgment, or for any other act made or done by him in his judicial capacity, is as thoroughly established as are any other of the primary maxims of the law. Such an exemption is absolutely essential to the very existence, in any valuable form, of the judicial office itself; for a judge could not be either respected or independent if his motives for his official actions or his conclusions, no matter how erroneous, could be put in question at the instance of every malignant or disappointed suitor. Hence we find this judicial immunity has been conferred by the laws of every civilized people. That it exists in this state in its fullest extent has been repeatedly declared by our own courts. Such was pronounced by the Supreme Court to be the admitted principle in the case of *Little v. Moore*, 1 South. 75; *Taylor v. Doremus*, 1 Harr. 473; *Mangold v. Thorpe*, 4 Vroom 134; and by this court in *Loftus v. Fraz*, 14 Vroom 667. To this extent there is no uncertainty or difficulty whatever in the subject.

But the embarrassment arises where an attempt is made to express with perfect definiteness when it is, the acts done by a judge and which purport to be judicial acts, are such within the meaning of the rule to which reference has just been made. It is said everywhere in the text-books and decisions, that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his action within the bounds of his jurisdiction, and jurisdiction has been defined to be "the authority of the law to act officially in the particular matter in hand." *Cooley on Torts* 417. But these maxims, although true in a general way, are not sufficiently broad to embrace the principle of immunity that appertains to a court or judge exercising a general authority. Their defect is that they leave out of account all those cases in which the officer in the discharge of his public duty is bound to decide whether or not a particular case, under the circumstances as presented to him, is within his jurisdiction, and he falls into error in arriving at his con-

clusion. In such instance, the judge, in point of fact and law, has no jurisdiction, according to the definition just given, over "the particular matter in hand," and yet, in my opinion, very plainly he is not responsible for the results that wait upon his mistake. And it is upon this precise point that we find confusion in the decisions. There are certainly cases which hold that if a magistrate, in the regular discharge of his functions, causes an arrest to be made under his warrant on a complaint which does not contain the charge of a crime cognizable by him, he is answerable in an action for the injury that has ensued. But I think these cases are deflections from the correct rule; they make no allowance for matters of doubt and difficulty. If the facts presented for the decision of the justice are of uncertain signification with respect to their legal effect, and he decides one way, and exercises a cognizance over the case; if the superior court in which the question arises in a suit against the justice differs with him on this close legal question, is he open, by reason of his error, to an attack by action? If the officer's exemption from liability is to depend on the question whether he had jurisdiction over the particular case, it is clear that such officer is often liable under such conditions, because the higher court, in deciding a doubtful point of law, may have declared that some element was wanting in the complaint which was essential to bring this case within the judicial competency of the magistrate. But there are many decisions which, perhaps, without defining any very clear rule on the subject, have maintained that the judicial officer was not liable under such conditions. The very copious brief of the counsel of the defendants abounds in such illustrations. As an example, we may refer to the old case of *Gwynne v. Poole*, 2 Lutw. 387, in which it was held that the justice was justified because he had reason to *believe* that he had jurisdiction, although there was an arrest in an action which arose out of the justice's jurisdiction. This case has been since approved in *Kemp v. Neville*, 10 C. B. (N. S.) 550. Here, if the test of official liability had been the mere fact of the right to take cognizance over the particular matter in hand, considered in the light of strict legal rules, this decision would have been the opposite of what it is. In the same way the subject is elucidated in *Brittain v. Kinnard*, 1 B. & B. 432, the facts being a conviction by a justice of a person of having gunpowder in a certain *boat*, a special act authorizing the detention of any suspected *boat*; and when the magistrate was sued in trespass for an illegal conviction, it was declared that the plaintiff, in order to show the defendant's want of cognizance over the proceedings leading to the conviction, could not give evidence that the craft in question was a *vessel* and not a boat, because the justice had judicially determined that point. And in this case likewise, the test of jurisdiction in the magistrate in point of fact and of law, was rejected; an inquiry into the authority by force of which the proceedings had been taken being disallowed for the reason that such question had been passed upon by the magistrate himself, the point being before him for adjudication. The same doctrine was promulgated in explicit and forcible terms by Mr. Justice Field, delivering the opinion of the Supreme Court of the United States, in the

case of *Bradley v. Fisher*, 13 Wall. 335, this being his language: "If a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence which it is not, and proceed to the arrest and trial of a party charged with such act, . . . no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever this general jurisdiction over the subject-matter is invoked."

These decisions, in my estimation, stand upon a proper footing, and many others of the same kind might he have referred to, but such course is not called for, as it must be admitted that there is much contrariety of results in this field, and the references above given are amply sufficient as illustrations for my present purposes. The assertion, I think, may be safely made, that the great weight of judicial opinion is in opposition to the theory that if a judge, as a matter of law and fact, has not jurisdiction over the particular case, that thereby, in all cases, he incurs the liability to be sued by any one injuriously affected by his assumption of cognizance over it. The doctrine that an officer having general powers of judicature, must, at his peril, pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance, is as unreasonable as it is impolitic. Such a regulation would be applicable alike to all courts and to all judicial officers acting under a general authority, and it would thus involve in its liabilities all tribunals except those of last resort. It would also subject to suit persons participating in the execution of orders and judgments rendered in the absence of a real ground of jurisdiction. By force of such a rule, if the Supreme Court of this state, upon a writ being served in a certain manner, should declare that it acquired jurisdiction over the defendant, and judgment should be entered by default against him, and if, upon error brought, this court should reverse such judgment on the ground that the service of the writ in question did not give the inferior court jurisdiction in the case, no reason can be assigned why the justices of the Supreme Court should not be liable to suit for any injurious consequence to the defendant proceeding from their judgment. As I have said, in my judgment, the jurisdictional test of the measure of judicial responsibility must be rejected.

Nevertheless, it must be conceded that it is also plain that in many cases a transgression of the boundaries of his jurisdiction by a judge, will impose upon him a liability to an action in favor of the person who has been injured by such excess. If a magistrate should, of his own motion, without oath or complaint being made to him, on mere hearsay, issue a warrant and cause an arrest for an alleged larceny, it cannot be doubted that the person so illegally imprisoned could seek redress by a suit against such officer. It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offences, for the conclusive reply would

be, that this particular case was not, by any form of proceeding, put under his authority.

From these legal conditions of the subject my inference is, that the true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers, is, that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put at *least colorably* under his jurisdiction. Whether the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically wilful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression.

The application of the above-stated rule to this case must, obviously, result in a judgment affirming the decision of the Circuit judge. There was a complaint, under oath, before this justice, presenting for his consideration a set of facts to which it became his duty to apply the law. The essential things there stated were, that the plaintiff, in combination with two other persons, "with force and arms," entered upon certain lands, and "with force and arms did unlawfully carry away about four hundred bundles of corn-stalks, of the value," &c., and were engaged in carrying other corn-stalks from said lands. By a statute of this state, (Rev., p. 244, § 99,) it is declared to be an indictable offence, "if any person shall wilfully, unlawfully and maliciously" set fire to or burn, *carry off* or destroy any barrack, cock, crib, rick or stack of hay, *corn*, wheat, rye, barley, oats or grain of any kind, * * * or any trees, herbage, growing grass, hay or other vegetables, &c. Now although the misconduct described in the complaint is not the misconduct described in this act, nevertheless the question of their identity was *colorably* before the magistrate, and it was his duty to decide it; and under the rule above formulated, he is not answerable to the person injured for his erroneous application of the law to the case that was before him.

As to the other defendant, all he did was to make his complaint on oath before the justice, setting forth the facts truly, and for such an act he could not be held liable for the judicial action which ensued, even if such action had been extra-judicial. But as the case was, as we have seen, brought within the jurisdiction of the judicial officer, neither this defendant, nor any other person could be treated as a trespasser for his co-operation in procuring a decision and com-

mitment which were valid in law, until they had been set aside by a superior tribunal.

Let the judgment be affirmed.

For affirmance—The Chancellor, Chief Justice, Depue, Dixon, Knapp, Magie, Parker, Reed, Van Syckel, Clement, Cole, Kirk, Green, Paterson. 14.

For reversal—None.¹

SULLIVAN v. JONES.

Supreme Court of Massachusetts, 1854. 2 Gray, 570.

Trespass for false imprisonment of the plaintiff on an execution, issued by Jones, a justice of the peace, on a judgment recovered before him against the plaintiff on a debt less than five dollars; which execution contained a command to the officer, for want of money or goods, to take the body of the plaintiff, and commit him to prison; and on which the plaintiff, by the direction of Jeremiah Russell, the other defendant, the attorney who brought the suit on which the judgment was recovered, was arrested and committed to jail.

MERRICK, J. The Rev. Sts. c. 97, §§ 44, 45, expressly declare that no person shall be imprisoned on mesne process or execution for any debt less than five dollars, or on any execution issued upon a judgment rendered upon a former judgment founded upon such a debt. And the forms of all executions are required to be so varied as to adapt them to that prohibition. § 47. In view of these provisions, there can be no doubt that the command, contained in the execution which was issued by Jones against the plaintiff, to take the body of the plaintiff and commit him to the Commonwealth's jail, was a direct violation of the positive requirements of the law. This is not denied by the defendants. But their defence is placed

¹ *Accord: Busted v. Parsons*, 54 Ala. 393 (1875); *McIntosh v. Bullard*, 95 Ark. 227 (1910); *Clark v. Spicer*, 6 Kans. 440 (1870); *Gillett v. Thiebold*, 9 Kans. 427 (1872); *Rush v. Buckley*, 100 Maine 322 (1905); *Landt v. Hiltz*, 19 Barb. 283 (N. Y. 1855); *Ayers v. Russell*, 50 Hun 282 (N. Y. 1888); *McCall v. Cohen*, 16 S. Car. 445 (1881); *Marks v. Sullivan*, 9 Utah 12 (1893); see *Austin v. Vrooman*, 128 N. Y. 229 (1891), and compare *Mitchell v. Foster*, 12 A. & E. 472 (1840), and *Truesdell v. Combs*, 33 Ohio St. 186 (1877).

In determining the existence of facts necessary to give it jurisdiction either a superior court of limited jurisdiction or a justice of the peace acts judicially and is not liable for error in taking jurisdiction, *Lange v. Benedict*, 73 N. Y. 12 (1878), *semble*, *Roderigas v. East River Savings Institution*, 63 N. Y. 460 (1875); *Scott v. McNeal*, 154 U. S. 34 (1894).

In *Thompson v. Jackson*, 93 Iowa 376 (1895); *Bell v. McKinney*, 63 Miss. 187 (1885), and *Anderson v. Roberts*, 35 S. W. 416 (Tex. Civ. App. 1896), it is held that a magistrate is not liable for acting outside his jurisdiction unless he does so knowingly or in bad faith, and see *Young v. Herbert*, 2 Nott & McC. 172 (S. Car. 1819).

In *Pratt v. Sanger*, 4 Gray 84 (Mass. 1855), it is held that a justice is liable if the law under which he acts is unconstitutional, but compare *Clark v. Spicer*, 6 Kans. 440 (1870), and *Cottam v. Oregon*, 98 Fed. 570, (C. C. Dist. of Oregon 1899).

by them on a wholly different ground. They insist that, in framing and issuing the execution, Jones acted in his judicial capacity as a justice of the peace, and for that reason is not responsible in any civil action to the plaintiff for any injurious consequences resulting from it.

If the position assumed by the defendants could be maintained as a matter of fact, the consequence contended for by them would undoubtedly follow. There is a familiar and well-known distinction between the judicial and ministerial powers and duties of justices of the peace. When acting in the former capacity, and within the limits of the jurisdiction conferred upon them, like the judges of other courts, they are exempted from liability to answer elsewhere in private actions for their official orders, decrees and judgments. *Pratt v. Gardner*, 2 Cush. 63. But they have always been held responsible to individuals in civil suits for all the injurious consequences arising from every illegal act they may have done, either in the adjudication of causes of which they had no jurisdiction, or in the exercise of their ministerial powers, or in the discharge of their ministerial duties. *Briggs v. Wardwell*, 10 Mass. 356. *Percival v. Jones*, 2 Johns. Cas. 49. *Spencer v. Perry*, 17 Maine, 413. *Clarke v. May*, ante, 410.

When, in the progress of a suit, a final judgment has been rendered, there can remain no further judicial duty to be performed. The court or magistrate has then no longer a question upon which to deliberate, or a cause between contending parties to decide. Nothing is left to be done but to carry the judgment into effect. That, under our law, is accomplished by means of an execution. It was early determined by this court that the issuing of such an execution by a justice of the peace was merely a ministerial act; and in a particular instance, where such process was issued erroneously, the magistrate was held responsible in damages for the commitment to prison of a party under it. *Briggs v. Wardwell*, 10 Mass. 356.¹

¹ Accord: *Fairchild v. Keith*, 29 Ohio St. 156 (1876); and *Larson v. Kelly*, 64 Minn. 51 (1896), facts similar to those in principal case; *McLendon v. American Freehold & Co.*, 119 Ala. 518 (1898), false certificate of the acknowledgment of a deed; *Stone v. Graves*, 8 Mo. 148 (1843). In *Abrams v. Carlisle*, 18 S. Car. 242 (1882); the premature entry of judgment and issuing of execution was held a judicial and not a ministerial act; and see also *Ward v. Freeman*, 2 Ir. C. L. 460 (1852), where four of eight judges following *Linford v. Fitzroy*, 13 A. & E. (N. S.) 240 (1849), held that if any part of the duties of the magistrate was judicial, the whole must be, it being impermissible to split up and divide his duty.

Even a judge of a superior court may be charged with the performance of purely ministerial duties, and is liable for neglect or misperformance of them, *Grider v. Tally*, 77 Ala. 422 (1884), refusal to issue liquor license.

As to the liability of a judge for the custody of money paid into court, see *Disbrow v. Mills*, 62 N. Y. 604 (1875); *State v. Faulkner*, 31 Hun 317 (N. Y. 1884).

"The essential and characteristic difference between a *judicial* and *ministerial* officer is, that the former is to give judgment, which requires perfect freedom of opinion, that the latter is to execute, which supposes obedience to some mandate prescribing what is to be done; and leaving nothing to opinion."—Richardson, J. in *Reid v. Hood & Burdine*, 2 Nott & McC. 168 (S. Car. 1819).

SECTION 2.

Immunity of Witnesses.

GARING v. FRASER.

Supreme Judicial Court of Maine, 1884. 76 Maine 37.

VIRGIN, J. The plaintiff alleges in substance that the defendants maliciously conspired to falsely accuse, and, by means of false testimony, to procure him to be indicted and convicted of the crime of maintaining a nuisance; that by false and perjured testimony the defendants did accuse him of said crime before the grand jury who found an indictment therefor against him; that he was tried on said indictment, and, by means of false and perjured testimony given by them at the trial, the jury found him guilty of the charge; that the court set aside the verdict because of said false and perjured testimony; and that thereupon the county attorney entered upon the records of the court a *nolle prosequi* to said indictment with allegations of damages.

The gist of the action is not the conspiracy alleged, but the tort committed by the defendants and the damage resulting therefrom.

The acts of the defendants are alleged to be false and perjured testimony. But at common law an action will not lie against one for perjury. *Dunlap v. Glidden*, 31 Maine, 435, 439; *Severance v. Judkins*, 73 Maine, 379; *Damport v. Sympson*, Cro. Eliz. 520; *Eyres*

There is much conflict as to what acts of a magistrate or other inferior judicial officer are ministerial. The granting of an appeal is held to be a ministerial act in *Tyler v. Alford*, 38 Maine 530 (1854), though demanding the exercise of discretion and the justice is liable if he act corruptly; *contra*, *Jordan v. Hanson*, 49 N. H. 199 (1870), while in *Ward v. Freeman*, 2 Ir. C. L. 460 (1852), a judgment for defendant in an action against an "Assistant Barrister" for his refusal to receive an appeal was affirmed by a divided court; and see *Cunningham v. Dilliard*, 4 Dev. & B. 351 (N. Car. 1839). In *Legates v. Lingo*, 8 Houst. 154 (Del. 1888), and *Tompkins v. Sands*, 8 Wend. 462 (N. Y. 1832), a refusal to approve an appeal bond was held a ministerial act, for which, if done from a corrupt motive, the justice was liable; *contra*, *Rains v. Simpson*, 50 Tex. 495 (1878), an approval of inadequate sheriff's bond; *Howe v. Mason*, 14 Iowa 510 (1863), an approval of replevin bond were held judicial acts. So in *Chickering v. Robinson*, 3 Cush. 543 (Mass. 1849), the approval of an invalid recognizance is held to be a judicial act. In *Grohmann v. Kirschman*, 168 Pa. St. 189 (1895), and *Flack v. Harrington*, 1 Breese 165 (Ill. 1826), justices of the peace, and in *Gibbs v. Randlett*, 58 N. H. 407 (1878), a sheriff, refusing to admit to bail or to receive adequate bail offered, were held liable; but see *Evans v. Foster*, 1 N. H. 374 (1819), in which it was intimated that a justice was not liable for demanding excessive bail. As to the liability of a justice issuing a warrant of his own motion or without the complaint required by law, see *McCarthy v. De Armit*, 99 Pa. St. 63 (1881), and *Wallsworth v. McCullough*, 10 Johns. 93 (N. Y. 1813), and see *Banister v. Wakeman*, 64 Vt. 203 (1891), a justice held to be acting ministerially in issuing a *mittimus* in a criminal case.

v. *Sedgwick*, Cro. Jac. 601; *Phelps v. Stearns*, 4 Gray, 106; *Rice v. Coolidge*, 121 Mass. 395, and cases cited.

But it is said that the English Sts. of 5 and 28 Eliz. provide that a party grieved by a judgment obtained by the perjury of witnesses might, after the reversal of the judgment, "recover his damages against every such person as did procure such judgment against him, by action on the case." Assuming, however, that these statutes are in force here, neither of them can be seriously contended to be applicable to this case. To be sure, it is a general rule of the common law and it has been substantially engrafted into Art. 1, § 19 of our constitution, that a man shall have remedy for every injury. 3 Black. Com. 123; *Ashby v. White*, 1 Salk. 21. But the law has more than one idea. And this principle however sound must be understood with such qualifications and limitations as other principles of law equally sound and important impose upon it. MORTON, J., 11 Pick. 532. Thus notwithstanding the rule first above mentioned, words spoken in the course of judicial proceedings, though they impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if applicable and pertinent to the subject of inquiry. *Barnes v. McCrate*, 32 Maine, 442; *Hoar v. Wood*, 3 Met. 193. So in the case at bar, while the law declares that every person shall have a remedy for every wrong, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony; but if they perjure themselves they may be indicted and punished therefor. *Barber v. Lester*, 7 C. B. (N. S.) (Erle, J.) 186.

Exceptions overruled.¹

¹ While the judgment against the plaintiff stands unreversed, no action is allowed against either the adverse party whose alleged perjury or subornation of perjury has procured such judgment, *Phelps v. Stearns*, 4 Gray 105 (Mass. 1855); *Curtis v. Fairbanks*, 16 N. H. 542 (1845); *Severance v. Judkins*, 73 Maine 376 (1882); *Dampert v. Sympson*, Cro. Eliz. 520 (1596); *Eyres v. Sedgwick*, Cro. Jac. 601 (1621); *Bostwick v. Lewis*, 2 Day 447 (Conn. 1807); *Smith v. Lewis*, 3 Johns. 157 (N. Y. 1808); or against a witness, *Grove v. Brandenburg*, 7 Blackf. 234 (Ind. 1844); *Cunningham v. Brown*, 18 Vt. 123 (1846); *Dunlap v. Glidden*, 31 Maine 435 (1850), where, however, the witnesses were joined as defendants with the successful adversary, and see *Taylor v. Bidwell*, 65 Cal. 489 (1884), since this involves raising the same issues already decided, for the purpose of collaterally attacking the judgment, which as to such party is final and conclusive until reversed upon appeal or set aside upon motion for new trial or other direct proceedings. Where, however, the plaintiff is not party to the judgment this reason does not apply and since the public policy which gives immunity of the witness does not require the protection of one suborning his perjury, a woman whose reputation was injured by a verdict in a divorce case finding the respondent guilty of adultery with her was held in *Rice v. Coolidge*, 121 Mass. 393 (1876), entitled to maintain an action against the parties to the divorce proceedings who had suborned a witness to falsely testify to the acts of adultery, but compare *Taylor v. Bidwell*, where, however, the plaintiff had been convicted of a criminal offense and had served his term of imprisonment before he had discovered the alleged perjury.

SECTION 3.

The Right to Arrest With or Without Warrant or to Seize Property Under Judicial Process.**(a) Arrest without warrant.**

BURNS v. ERBEN.

Court of Appeals of New York, 1869. 40 N. Y. 463.

WOODRUFF, J. By section 8 of the act to establish a Metropolitan Police District, passed April 15th, 1857 (chap. 569 of Laws of 1857), the members of the police force of that district are given "in every part of the state of New York, all the common law and statutory powers of constables, except for the service of civil process." And in the amendatory act passed April 10, 1860 (chap. 259 of Laws of 1860), it is declared in the 28th section, that the members of the police force of that district "shall possess in every part of the state all the common law and statutory powers of constables, except for the service of civil process."

In pursuance of information given by the defendant, Erben, the defendant, Frost, accompanied by Erben, arrested the plaintiff without a warrant, took her to the police station, where she was detained a few minutes, and after some conversation with the officer in charge, she was permitted to return to her residence. For this she has brought the present action for false imprisonment.

A felony had been committed that evening, at the house of Mr. Henry Erben, the defendant's father. On that point there is no dispute or conflict. The plaintiff had visited the house that evening, and, according to the information upon which the defendant acted, was the only person not a member of the family, who had been in the basement. Silver had been stolen from the basement. It was there when the plaintiff entered and until after 8 o'clock; and it was missed very shortly after she left the house. Of these facts the proof was distinct and without contradiction.

Upon a report of these facts, Frost, accompanied by the defendant, Erben, made the arrest as above stated.

The inquiry is, therefore, whether under the statutes above cited and the common law rule in respect of arrests made or aided by private persons, the plaintiff was entitled to recover. There were no facts in dispute requiring the submission of any question to the jury, unless it be held that there was no justification.

I have no doubt upon the subject. The writers upon criminal law and the reported cases, so far as I have examined them, hold uniform language.

Lord Tenterden, Ch. J., in *Beckwith v. Philby* (6 Barn. & Cres., 635), says: "The only question of law in this case is, whether a constable, having a reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities." (See Hawk P. C., book 2, chap. 12, 13; 1 Russell on Crime, 594, 5; Steph. Cr. L., 242, 3; 1 Chit. Cr. L., 15, 17; *Samuel v. Payne*, Doug., 358; *Lawrence v. Hedger*, 3 Taunt., 14; *Regina v. Toohy*, 2 Ld. Raymond, 130; *Hobbs v. Brandscomb*, 3 Camp., 420; *Davis v. Russell*, 5 Bing., 354; *Cowles v. Dunbar*, 2 Car. and P., 565.)

In *Ledwith v. Catchpole* (Cald. Cas., 291, and 1st Burns, Justice, p. 130, 1), Lord Mansfield says, in an action against the officer: "The question is, whether a felony has been committed or not. And then the fundamental distinction is, that if a felony has actually been committed, a private person may, as well as a police officer, arrest; if not, the question always turns upon this, was the arrest *bona fide*? Was the act done fairly and in pursuit of an officer, or by design, or malice, or ill will? * * * It would be a terrible thing, if, under probable cause, an arrest could not be made * * *; many an innocent man has and may be taken up upon suspicion; but the mischief and inconvenience to the public in this point of view, is comparatively nothing; it is of great consequence to the police of the country."¹

The justification of an arrest by a private person was made in *Allen v. Wright* (8 Carr and Payne, 522), to depend on first, the fact that a felony had been actually committed; and *second*, that the circumstances were such that a reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it.²

¹ In *Wakely v. Hart*, 6 Binney 316 (Pa. 1814), it was unsuccessfully contended that the provision in the constitution of Pennsylvania, common to all state constitutions, declaring that all persons shall be secure against unreasonable searches and seizures and providing that no warrants shall issue without describing the person or property "as nearly as may be nor without probable cause supported by oath", had made illegal the arrest without warrant of a person even if actually guilty of felony; *accord: Rohan v. Sawin*, 5 Cush. 281 (Mass. 1850), arrest by constable on reasonable suspicion, Dewey, J. saying that such provisions do not "conflict with the authority of constables or other peace officers or private persons under proper limitations to arrest without warrant those who have committed (or, if the arrest is by a constable, are reasonably suspected to have committed) felonies. The public safety and the due apprehension of criminals charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law"; see also, *McCarthy v. De Armit*, 99 Pa. St. 63 (1881).

² *Accord: Long v. State*, 12 Ga. 293 (1852); *Garnier v. Squires*, 62 Kans. 321 (1900); *Maliniemi v. Gronlund*, 92 Mich. 222 (1892); *Spencer v. Anness*,

These principles are affirmed in this State in *Mix v. Clute* (3 Wend., 350), in very distinct terms. "If a felony has been committed by the person arrested, the arrest may be justified by any person without a warrant." If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal,⁴ though an officer would be justified if he acted upon information from another which he had reason to believe."⁵

32 N. J. L. 100 (1866); *Reuck v. McGregor*, 32 N. J. L. 70 (1866); *McCarthy v. De Armit*, 99 Pa. St. 63 (1881), *semble*; *Brooks v. Commonwealth*, 61 Pa. 352 (1869), *semble*; but see *Grinnell v. Weston*, 95 App. Div. 454 (N. Y. 1904); *Brockway v. Crawford*, 48 N. Car. 433 (1856). The plea should set forth the grounds for the defendant's suspicion of the plaintiff's guilt, *Mure v. Kaye*, 4 Taunt. 34 (1811); *Spencer v. Anness*, 32 N. J. L. 100 (1866) and *Edger v. Burke*, 96 Md. 715 (1903), and the question as to whether the defendant, whether private person or officer, had reason to suspect the plaintiff, is a question for the decision of the court, *Howard v. Clarke*, L. R. 20 Q. B. Div. 558 (1888); *Spencer v. Anness*, 32 N. J. L. 100 (1866); *McCarthy v. De Armit*, 99 Pa. St. 63 (1881); but see *Grinnell v. Weston*, 95 App. Div. 454 (N. Y. 1904); *Cochran v. Toher*, 14 Minn. 385 (1869), and *Rohan v. Sawin*, 5 Cush. 281 (Mass. 1849).

In *Dodds v. Board*, 43 Ill. 95 (1867), *Kindred v. Stitt*, 51 Ill. 401 (1869), and *Rohan v. Sawin*, 5 Cush. 281 (Mass. 1849), it is held that a private person can only justify by showing the actual guilt of the person arrested; see also *Lander v. Miles*, 3 Ore. 35 (1868); see *Gold v. Armer*, 140 App. Div. 73 (N. Y. 1910), p. 75.

⁴ *Wakely v. Hart*, and *Rohan v. Sawin*, 5 Cush. 281 (Mass. 1849), Note 1; *Wrexford v. Smith*, 2 Root 171 (Conn. 1795). So a private person may arrest a felon who has escaped from a prison in the state in which the arrest occurs, *State v. Holmes*, 48 N. H. 377 (1869), but not a fugitive from justice from another jurisdiction, *Botts v. Williams*, 17 B. Mon. 687 (Ky. 1856); *Wells v. Johnston*, 52 La. Ann. 713 (1900); but see *Cochran v. Toher*, 14 Minn. 385 (1869).

⁵ *Doughty v. State*, 33 Tex. 1 (1870), and see *dicta* in many of the cases cited in Note 2.

⁶ *Accord*: *Samuel v. Payne*, 1 Douglas 359 (1780), Lord Mansfield saying "it would be most mischievous that the officer should be bound," (before making the arrest), "first to try, and at his peril exercise his judgment on the truth of the charge"; *Hobbs v. Branscomb*, 3 Camp. 420 (1813); *Hogg v. Ward*, 3 H. & N. 417 (1858); *Johnson v. State*, 30 Ga. 426 (1860); *Dodds v. Board*, 43 Ill. 95 (1867), *semble*; *Doering v. State*, 49 Ind. 56 (1874); *Garnier v. Squires*, 62 Kans. 321 (1900); *Werner v. Commonwealth*, 80 Ky. 387 (1882); *Cochran v. Toher*, 14 Minn. 385 (1869); *Filer v. Smith*, 96 Mich. 347 (1893); *Neal v. Joyner*, 89 N. Car. 287 (1883); *McCarthy v. De Armit*, 99 Pa. St. 63 (1881); *Eanes v. State*, 6 Humph. 53 (Tenn. 1845); *Burke v. Bell*, 36 Maine 317 (1853); *Edger v. Burke*, 96 Md. 715 (1903); *Rohan v. Sawin*, 5 Cush. 281 (Mass. 1849). In such case the person making the charge is answerable, the officer is not liable, *Samuel v. Payne*, 1 Douglass 359 (1780), and *Holly v. Mix*.

A peace officer enjoys equal immunity where he acts on his own motion, having from his own knowledge reasonable grounds to suspect that a felony has been committed, *Beckwith v. Phelby*, cited in the principal case; *Johnson v. Collins*, 28 Ky. L. 375 (1905); *Brish v. Carter*, 98 Md. 445 (1904); *McCarthy v. De Armit*, 99 Pa. St. 63 (1881); *Brockway v. Crawford*, 3 Jones (Law) 433 (N. Car. 1856).

The fact that the warrant has been issued is sufficient grounds for suspicion, *Filer v. Smith*, 96 Mich. 347 (1893); *Creagh v. Gamble*, 24 L. R. Ir.

The fact being proved in this case that a felony had in fact been committed, I have no hesitation in saying that, however unfortunate it was to the plaintiff, the circumstances fully justified the suspicion which led to her arrest. It is claimed that these circumstances should have been submitted to the jury. Not so; a verdict finding no reasonable ground of suspicion would have been against evidence. There was no conflict of testimony, and that the arrest was made without malice, in good faith, and upon reasonable grounds, is to my mind incontrovertible.

The appeal appears to me to have been taken upon a misapprehension of the construction and effect of the statutes conferring power on the policeman. I think the power perfectly clear, and I notice that the rules and regulations of the board of police are in conformity therewith; and it is made the duty of the officer to take the arrested person immediately before the Police Court, or if made at night or when the courts are not open, immediately to the station house, where the officer on duty is required to examine whether there is reasonable ground for the complaint, and if so, to cause the party to be taken before the court the next morning. Under such a system, innocent parties may sometimes be subjected to inconvenience and mortification; but any more lax rules would be greatly dangerous to the peace of the community and make the escape of criminals frequent and easy.

The judgment should be affirmed.

All the judges concurring, judgment affirmed.*

STATE v. LEWIS.

Supreme Court of Ohio, 1893. 50 Ohio St. 179.

BRADBURY, C. J. The defendant was indicted for murder in the second degree for causing the death of one Edward Elliott, in the course of an attempt to arrest the latter for the commission of a misdemeanor. The defendant was marshal of the village of Hillsboro, in Highland county, and being put upon trial for the homicide, it became material to inquire into the authority of such officers to make arrests without a written warrant therefor.

That the defendant was marshal of the village of Hillsboro;

458 (1888). But the officer is bound to know the law, he is not excused if he erroneously supposed that certain acts committed, or reasonably believed to have been committed, by the plaintiff constituted a felony, *Malcolmson v. Scott*, 56 Mich. 459 (1885). In *Sugg v. Pool*, 2 Stew. & P. 196 (Ala. 1832), *Vice v. Holly*, 88 Miss. 572 (1906), *cf. Formwalt v. Hylton*, 66 Tex. 288 (1886), it is held, relying on cases holding that an officer arresting on a warrant must at his peril arrest the person named therein, that a mistake in identity is at the officer's peril; *contra, Edger v. Burke, Brockway v. Crawford, Filer v. Smith*, 96 Mich. 347 (1893).

*The right of arrest without warrant is not affected by the fact that there was time to obtain a warrant, *Davis v. Russell*, 5 Bing. 354 (1829); *Holley v. Mix*, 3 Wend. 350 (N. Y. 1829); *Rohan v. Sawin*, 5 Cush. 281 (Mass. 1849).

did not witness the affray nor procure from a magistrate a warrant for the arrest of the deceased, are conceded facts. In addition to this the testimony given in behalf of the state tended to prove that the deceased had participated in an affray in a saloon within the village of Hillsboro, on the day of the homicide; that the defendant was absent and did not hear or see any part of the affray; that a few minutes thereafter he received information that a breach of the peace had been committed, and at once went to the saloon where it had occurred; that when he reached the saloon, the parties to it had gone and good order had been restored; that upon inquiry the defendant was told that an affray had been committed, in which the deceased had participated, and ascertaining the direction taken by the deceased, the defendant, without obtaining a warrant, immediately pursued, soon after overtook and proceeded to arrest him for that offense; that the deceased, though having knowledge of the official character of the defendant, resisted the arrest, and in the resulting struggle was shot and killed by the defendant.

The authority of peace officers to arrest without a warrant from a magistrate is a subject that has received the attention of the courts and text-writers from an early period in the history and development of the common law in both England and America. Some of the earlier English authorities, while the prerogatives of the government were more highly considered than at a later day, maintained the power. (2 Hale P. C. 90.) But even then the doctrine met with a resistance which finally overturned it. (1 East P. C. 305.) *Regina v. Tooley*, 2 Lord Raymond, 1301, where Lord Holt, in delivering the opinion of the majority of the court, is reported as saying: "The prisoners in this case had sufficient provocation; for if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion; much more where it is done under a color of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of England. He said, that a constable cannot arrest, but when he sees an actual breach of the peace,¹ and if the affray be over, he cannot arrest." See also 2 Hawk. Crim. Law, 13, Sec. 8. The later English authori-

¹ The right of a constable or other peace officer to immediately arrest for breach of the peace committed in his presence is universally recognized. Anon. Y. B. 7 Henry VII 6 pl. 12 (1480); *United States v. Hart*, Peters 390 (U. S. 1817); *Vandever v. Mattocks*, 3 Ind. 479 (1852); *Hutchinson v. Sangster*, 4 G. Greene 340 (Iowa 1854); *Taaffe v. Kyne*, 9 Mo. App. 15 (1880); *Commonwealth v. Deacon*, 8 S. & R. 47 (Pa. 1822); *Perry v. Pa. R. Co.*, 41 Pa. S. C. 591 (1910); *Taylor v. Strong*, 3 Wend. 384 (N. Y. 1829); *State v. Bowen*, 17 S. Car. 58 (1881); *Ross v. State*, 10 Tex. App. 455 (1881); *Main v. McCarty*, 15 Ill. 441 (1854). At common law the right of a peace officer to arrest without warrant upon view of offenses less than felony, was confined to breaches of the peace and offenses punishable in a summary manner, Clerk and Lindsell on Torts, 6th ed. 350; *Park v. Taylor*, 118 Fed. 34 (1902); *Commonwealth v. Wright*, 158 Mass. 149 (1893); *Way's Case*, 41 Mich. 299 (1879); *Danovan v. Jones*, 36 N. H. 246 (1858); *Booth v. Hanley*, 2 C. & P. 288 (1826), arrest of one committing a nuisance, see *Mumford v. Starmont*, 139 Mich. 188 (1905), *Schnider v. Montross*, 158 Mich. 263 (1909), and *Moore v. Durgin*, 68 Maine 148 (1878); *contra*, *State v. McNally*, 87 Mo. 644 (1885), [holding also that killing to effect arrest is justifiable, as to

ties seem to settle the law there in accordance with the views of Lord Holt. *Coupey v. Henley et al.*, 2 Esp. 540; *Baynes v. Brewster*, 2 A. & E. (N. S.) 375; *Regina v. Mable*, 9 C. & P. 474; *Timothy v. Simpson*, 1 C. M. & R. 757; *Grant v. Moser*, 5 Mann & G. 123; 1 Russ. on Cri. (8th ed.) 410, 805. In the case of *Cook v. Nethercote*, 6 C. & P. 741, Alderson, B., in summing up says: "If, however, there has been an affray, and that affray were over, then the constable had not and ought not to have the power of apprehending the persons engaged in it; for the power is given him by law to prevent a breach of the peace; and where a breach of the peace had been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a magistrate." *Id.* 744.

The American authorities establish the same rule. *Roberts v. The State*, 14 Mo. 138; *The People v. James Haley*, 48 Mich. 495; *Phillips v. Trull*, 11 John. 486; *Pow v. Beckner et al.*, 3 Ind. 475; 1 Bishop on Cr. Procedure, 183, 184; *Quinn v. Heisel*, 40 Mich. 576; *In re Sarah Way*, 41 Mich. 299; *Commonwealth v. Carey*, 12 Cush. 246.²

This court has held that city council may lawfully authorize police officers to arrest upon view any person found in the act of violating the ordinances of the city, made for the preservation of good order and public convenience. *White v. Kent*, 11 Ohio St. 550. Also that the officer in making arrest upon view is not bound to disclose his official character. *Wolf v. State*, 19 Ohio St. 248. And that it is lawful to arrest, without warrant, one who is unlawfully carrying a concealed weapon, though the officer had no previous knowledge of the fact if he acted *bona fide* upon knowledge which induced an honest belief that the person was violating the law in this respect. *Ballard v. State*, 43 Ohio St. 340. But the facts in those cases disclose that the person arrested was taken while in the act of committing the offense for which he was apprehended, while in the case under consideration the evidence tended to show that the defendant acted upon information only, and that the affray was over, and public order restored before he attempted to pursue or arrest the supposed offender.

which see *Tiner v. State*, 44 Tex. 128 (1875)]; *Webb v. State*, 51 N. J. L. 189 (1889), *semble*, *Percival v. Bailey*, 70 S. Car. 72 (1904), and *Baltimore & Ohio R. Co. v. Cain*, 81 Md. 87 (1895).

² *Accord*: *Kurtz v. Moffitt*, 115 U. S. 487 (1885), arrest of deserter from the United States army; *Sharrock v. Hannemer*, Cro. Eliz. 375 (1595); *Cohen v. Huskisson*, 2 M. & W. 477 (1837); *Ross v. Leggett*, 61 Mich. 445 (1886); *People v. McLean*, 68 Mich. 480 (1888); *Percival v. Bailey*, 70 S. Car. 72 (1904); *Thorne v. Turck*, 94 N. Y. 90 (1883), and *Fox v. Gaunt*, 3 B. & Ad. 798 (1832), both cases of arrest for obtaining money under false pretenses; *Pinkerton v. Verberg*, 78 Mich. 573 (1889), and *State ex rel. Kingsley v. Pratt*, 22 Hun 300 (N. Y. 1880), women arrested as "street-walkers"; but see *Smith v. Donnelly*, 66 Ill. 464 (1873), where an owner of a horse and wagon which had been untied, unlawfully taken and drawn off by mischievous boys, was held justified in arresting them while still driving the horse, though the taking was not a felony but a high misdemeanor; and see *State v. Diets*, 59 Kans. 576 (1898).

BALTIMORE & OHIO R. CO. v. CAIN.

Court of Appeals of Maryland, 1895. 81 Md. 87.

McSHERRY, J., delivered the opinion of the Court.

During the progress of the trial, which resulted in a verdict and judgment for the plaintiff, four exceptions were reserved and the defendant then took the pending appeal.

The plaintiff with three companions, including one by the name of Watkins, were passengers on the defendant's train going to Washington, D. C. They entered the ladies' car, and while, the evidence was conflicting, the testimony for the defendant was to the effect that they were intoxicated and behaved in a disgraceful, shocking and disorderly manner, using profane language so obscene as to drive the female passengers from the car. Many of the other passengers complained to the conductor, who feeling himself unable to cope with them and personally eject them, telegraphed to Washington for an officer to arrest them. When the train reached Washington the policeman was there, and the conductor pointing out the plaintiff, arrested him and took him to the station house, where the conductor appearing against him he was fined five dollars.¹

With these facts before the jury, there were two prayers presented by the plaintiff, both of which were granted; and there were nine presented by the defendant, all of which, except the sixth, were rejected. The view we take of the case dispenses with a separate consideration of each of these prayers, inasmuch as the defendant's fifth prayer raises the crucial inquiry contained in the record; and what we shall say in discussing the prayer will, with a few brief additional observations, dispose of most, if not all, of the others. The fifth prayer maintains that if the plaintiff was riotous and disorderly the conductor had the right to eject him; that if the conductor was unable to do this by reason of the threat of resistance, then the conductor was justified in requesting the first police officer whom he could find to arrest the plaintiff; and it proceeds, "if the jury further find, that the police officer at the Washington depot was the first police officer the conductor saw, and that the conductor used due diligence in procuring a police officer, and that the conductor directed the police officer to arrest the plaintiff for said disorderly conduct, that the defendant is not liable for this arrest, and the verdict of the jury must be for the defendant." From this prayer, considered in connection with the evidence to which allusion has been made, it is obvious at a glance that the predominant and controlling question before us involves the legality of the conceded arrest made in the city of Washington. Under the undisputed proof that arrest was made without a warrant having been first procured.

It was not made for an alleged felony, nor for a misdemeanor or breach of the peace committed within view of the officer who took

¹ The statement of facts is condensed from those given in the opinion of the Court.

the plaintiff into custody; but, if the evidence of the defendant's witnesses be credited, it was made for a flagrant breach of the peace, which began at Washington Grove and continued into Washington City, on the moving train of the defendant, and was made at the instance of the conductor the very moment he reached a place where he could deliver these intoxicated offenders into the custody of a police officer. Was the arrest so made illegal?

It is settled that an officer has the right to arrest without a warrant for any crime committed within his view. It was his duty to do so at the common law, and this is still the law. *Roddy v. Finnegan*, 43 Mo. 504; *Phillips v. Trull*, 11 Johns. 486; *Derecourt v. Corbishly*, 5 El. & Bl. 188;² and in cases of felony he may arrest upon information, without warrant, where he has reasonable cause. *Rex v. Birnie*, 1 Moody & R. 160; *Rohan v. Sawin*, 5 Cush. 281. And so any person, though not an officer, in whose view a felony is committed, may arrest the offender. *Ruloff v. People*, 45 N. Y. 213. But the right of a person not an officer to make an arrest is not confined to cases of felony, for he may take into custody, without a warrant, one who in his presence is guilty of an affray or a breach of the peace. *Knot v. Gay*, 1 Root, 66. "It seems agreed that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace."³ 1 Rus. on Crimes, 272; 1 Arch. Crim. Prac. & Pl. 82; 1 Haw. P. C., ch. 63, sec. 11 and 17; 2 Hale P. C., 90; East P. C., 306; *Timothy v. Simpson*, 1 C. M. & R. 757. The case last cited was one of trespass for assault and false imprisonment and taking the plaintiff to a police station. Plea, that the defendant was possessed of a dwelling house and the plaintiff entered the same and then and there insulted, abused and ill-treated the defendant and his servants, and greatly disturbed them in the peaceable enjoyment thereof in breach of the peace, whereupon the defendant requested the plaintiff to cease his disturbance and to depart from and out of the house, which the plaintiff refused to do; and thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a policeman, and requested the policeman to take the plaintiff into his custody to be dealt with according to law, and the policeman gently laid his hands on the plaintiff and took him into custody. It appeared in evidence that the plaintiff entered the defendant's shop to purchase an article, when a dispute arose between the plaintiff and the defendant's shopman; that plaintiff refused on request to go out of the shop; the shopman endeavored to turn him out and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came

² But see Note 1 to *State v. Lewis*, ante, p. 977.

³ A witness to any breach of the peace may summon the police and give the offender unto custody, *Ingle v. Bell*, 1 M. & W. 516 (1836); *Cohen v. Huskisson*, 2 M. & W. 477 (1837). So when the constable though present fails to act, a bystander may call on him to do his duty and make the arrest, *Derecourt v. Corbishley*, 5 E. & B. 188 (1855).

in; that the defendant then requested the plaintiff to leave the shop quietly; but he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station house. Parke, B., in course of his lucid opinion, said, "it is unquestionably true that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers and detain them until the heat be over, and then deliver them to a constable." Then quoting from *Haw. P. C.*, the same passage we have transcribed from 1 *Rus. on Crimes*, the learned Baron went on, "and pleas founded upon this rule and signed by Mr. Justice Buller are to be found in 9 *Went. Plead.* 344, 345, and *DeGrey, C. J.*, on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him until his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer. And if that be so, what reason can there be why he cannot arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is, that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts.⁴ In truth, whilst those are assembled who have committed acts of violence and the danger of their renewal continues, the affray itself may be said to continue; and during the affray the constable may not merely on his own view,

⁴ *Accord: Cohen v. Huskisson*, 2 M. & W. 477 (1837) note; *Price v. Seeley*, 10 Cl. & F. 28 (1843); *Quinn v. Heisel*, 40 Mich. 576 (1879). Similarly either a private person or an officer has the right to arrest one, who though not having previously broken the peace, gives such person or officer, by his overt acts, reasonable ground to apprehend that unless arrested he will immediately break the peace, but the mere fact that the plaintiff is still at the place where he has previously broken the peace will not justify the belief that he intends to renew the affray, *Quinn v. Heisel*, 40 Mich. 576 (1879), nor will the past commission of a misdemeanor together with opportunity to repeat it justify an arrest, *Pinkerton v. Verberg*, 78 Mich. 573 (1889), *Reg. v. Mabel*, 9 C. & P. 474 (1840), *Knot v. Gay*, 1 Root 66 (Conn. 1774). "Preventive measures to be effective, must be taken on the appearance of things. It is too late, after the mischief is accomplished"—*Hayes v. Mitchell*, 80 Ala. 183 (1885). Any person is entitled to restrain one who is about to commit a felony and keep him in custody until he can be handed over to a constable, *Handcock v. Baker*, 2 B. & P. 260 (1800).

⁵ The right of a private person arresting or causing the arrest depends on the actual guilt of the person arrested, suspicion, no matter how reasonable, gives no such right, *Palmer v. Maine Cent. R. Co.*, 92 Maine 399 (1899); and see *Cook v. Nethercote*, 6 C. & P. 741 (1835). As to the right of a peace officer to arrest on reasonable suspicion of a breach of the peace, or criminal offence less than felony, compare *Shanley v. Wells*, 71 Ill. 78 (1873), *Phillips v. Fadden*, 125 Mass. 198 (1878), *Gold v. Armer*, 140 App. Div. 73 (N. Y. 1910); and *State v. Hunter*, 106 N. Car. 796 (1890), with *State v. Johnson*, 5 Harr. 507 (Del. 1853), and *McCullough v. Commonwealth*, 67 Pa. 30 (1870); and see *Palmer v. Maine Cent. R. Co.*, 92 Maine 399 (1899), and *Enright v. Gibson*, 219 Ill. 550 (1906), construing the provisions of the Illinois Criminal Code.

but on the information and complaint of another, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable. *Lord Hale, P. C.*, 89 * * * It is clear upon facts that there was a defence on the ground of the defendant's right to arrest for a breach of the peace in his presence." See also *Grant v. Moser*, 5 M. & Gr. 127; *Simmons v. Milligan*, 2 C. B. 524; *Webster v. Watts*, 11 Q. B. 311 (63 E. C. L. R.); *Cohen v. Huskision*, 2 M. & W. 477; *Shaw v. Chairitie*, 3 C. & K. 21; *Burns v. Erben*, 40 N. Y. 466; *Smith v. Donnelly*, 66 Ill. 464; *Tiedeman on Lim. Police Power*, 84; *State v. Sims*, 16 S. Car. 486—a case strikingly opposite.

Now, if it be true that the plaintiff was guilty of the reprehensible and disorderly conduct attributed to him by the witnesses, he was incontestably engaged in a flagrant and outrageous breach of the peace, as pronounced as if there had been an actual affray during the whole time he was in the defendant's car; and it was clearly lawful, under these conditions, for the conductor to expel him and his drunken companions from the train if he had a sufficient force to overcome their threatened resistance, or else to arrest them all without warrant and then deliver them to the first peace officer he could procure within a reasonable time. If this were not so, then, as said by Lord C. J. Denman in *Webster v. Watts, supra*, "the peace of all the world would be in jeopardy." And it would be in jeopardy because if in such and similar instances no arrest could be lawfully made without a warrant, the culprit, "if transient and unknown, would escape altogether," before a warrant could be obtained. *Mitchell v. Lemmon*, 34 Md. 181. And there would soon cease to be any order or any security or protection afforded the public on swiftly moving railroad trains, or even elsewhere, unless a peace officer were constantly present. The delay necessarily incident to obtaining a warrant would be in many, if not in most cases of this and a kindred character, equivalent to an absolute immunity from arrest and punishment; and should the name of the offender be unknown, he most probably never would be apprehended if once suffered to depart. The law is not so impotent and ineffective as that. Being physically unable to expel these alleged riotous persons from the train, the conductor telegraphed for a peace officer, and without delay, and whilst the plaintiff was still drunk, caused his arrest the instant the officer thus summoned came in view of the plaintiff. If, then, any bystander could, in the language of Baron Parke, "for the sake of the preservation of the peace * * * restrain the liberty of him whom he sees breaking" the peace, the act of the conductor in telegraphing for the policeman and within a short space of time thereafter handing the plaintiff over to the officer, was in no respect different from a formal arrest of the plaintiff by the conductor, in the midst of the riot and disorder, and the prompt delivery of him afterward to the officer. If the plaintiff was not in fact arrested by the conductor because of the presence of superior resisting force, that fact cannot make the subsequent act of the conductor in pointing out the plaintiff to the officer, wrongful or illegal. The charge,

according to the plaintiff's own testimony, was sustained; a fine was imposed and he paid it. The accusation was therefore well-founded,⁸ and what was done by the conductor, if the facts testified to by the defendant's witnesses be credited, was undeniably lawful under all the circumstances. If this be so, then there is obviously no cause of action against the defendant, because no wrong has been done to the plaintiff. This is the theory of the defendant's fifth prayer. That prayer being correct in principle and proper in form ought to have been granted.

Judgment reversed with costs above and below, and new trial awarded.

WAHL v. WALTON.

Supreme Court of Minnesota, 1883. 30 Minn. 506.

GILFILLAN, C. J. Gen. St. 1878, c. 105, § 11, provides: "A peace officer may, without a warrant, arrest a person—*First*, for a public offense committed or attempted in his presence; *second*, when a person arrested has committed a felony, although not in his presence; *third*, when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it; *fourth*, on a charge made, upon reasonable cause, of the commission of a felony by the party arrested."

This action is for false imprisonment. The defendant justifies the imprisonment as upon an arrest of plaintiff, made by him, then a police officer of the city of Minneapolis, without a warrant, for a violation, in his presence, of an ordinance of that city. There was evidence tending to show that, about noon, the plaintiff violated the ordinance in the presence of defendant. The defendant did not then attempt to make the arrest, but went about his other duties during the afternoon, and arrested plaintiff at 5 or 6 o'clock in the evening. There was also evidence tending to show that plaintiff was committing a similar violation of the ordinance at the time of the arrest. The court instructed the jury, in effect, that if plaintiff was, at the time of the arrest, committing a violation of the ordinance, that would justify the arrest, though without a warrant, but that defendant had no authority to arrest in the evening for a violation at noon.

At the common law, a constable might, without warrant, arrest for a breach of the peace committed in his view. 4 Bl. Com. 292. But it was well settled that in case of an offence not a felony, the arrest must have been made at the time of, or within a reasonable time after, its commission. *Regina v. Walker*, 25 Eng. Law & Eq. 589; *Cook v. Nethercote*, 6 C. & P. 741; *Clifford v. Brandon*, 2 Camp. 358; *Derecourt v. Corbishley*, 5 El. & Bl. 188; *Phillips v. Trull*, 11 John. 486; *Taylor v. Strong*, 3 Wend. 384; *Meyer v. Clark*, 41 N. Y. Sup. Ct. 107. In case of felony *actually* committed, although not in his presence, he might, upon probable suspicion, arrest without a warrant. The reason for the distinction lay in the greater

gravity of the latter class of offences, and the greater importance to the public of bringing the offenders to punishment.

When it is said that the arrest must be made at the time of or immediately after the offence, reference is had, not merely to time, but rather to sequence of events. The officer may not be able, at the exact time, to make the arrest; he may be opposed by friends of the offender; may find it necessary to procure assistance; considerable time may be employed in the pursuit. The officer must at once set about the arrest, and follow up the effort until the arrest is effected. In *Regina v. Walker, supra*, some two hours had elapsed between the offence and the arrest, and it was held that the authority to arrest was gone, because there was no continued pursuit; and the same was held in *Meyer v. Clark, supra*, because the officer had departed and afterward returned, the court saying, the shortness of the interval does not affect the question. In this case, some five hours having elapsed between what occurred at noon and the arrest, during which the defendant was not about anything connected with the arrest, the court was right in its instructions that there was no authority to arrest for that occurrence.

The record of the plaintiff's conviction before the municipal court was *res inter alios acta*, and therefore not competent.

Order affirmed.¹

LEGER v. WARREN.

Supreme Court of Ohio, 1900. 62 Ohio St. 500.

WILLIAMS, J. It was shown on the trial, that the plaintiff was arrested by the defendant officers without warrant, as alleged in the petition, and was imprisoned after such arrest for a period of more than five days, without any warrant for his detention, and without any charge having been made against him before any competent tribunal, or opportunity allowed him for a trial; that during his imprisonment he frequently demanded to be informed of the nature of the charge on which he was detained, and to be taken before a proper court for a hearing thereon; and that, at the end of the period named, when he was discharged from prison, no complaint had been filed against him, nor trial allowed him. These facts were not disputed. The evidence of the defense was directed entirely to the establishment of good cause for the arrest, and to the subject of damages. There was no impropriety, therefore, in the court treating as undisputed the facts above stated and no complaint is urged here on that account. The objection made, is to that part of the charge by which the jury were instructed, in substance, that though the defendants making the arrest or causing it to be made, had good cause therefor, that did not justify the imprisonment of the plaintiff thereunder for a longer period than was reasonably necessary to enable the defendants to obtain a warrant, or authority from some competent tribunal, for his further detention; and, that his con-

¹ See also, *State v. Lewis*, 50 Ohio St. 179 (1893), p. 187, *semble*.

tinued imprisonment without such warrant or authority, rendered them liable as wrongdoers from the beginning, leaving only the question of damages for the consideration of the jury. In this charge we think there was no error. It is provided by Section 7130, of the Revised Statutes, that: "When a felony has been committed, any person may, without a warrant, arrest another who he believes, and has reasonable cause to believe, is guilty of the offense, and may detain him until a legal warrant can be obtained."

The right to make arrests without warrant is conferred by the statute in order to prevent the escape of criminals where that is likely to result from delay in procuring a writ for their apprehension; and it was not the purpose to dispense with the necessity of obtaining such writ as soon as the situation will reasonably permit. To afford protection to the officer or person making the arrest, the authority must be strictly pursued; and no unreasonable delay in procuring a proper warrant for the prisoner's detention can be excused or tolerated. Any other rule would leave the power open to great abuse and oppression. The detention of the plaintiff in prison for a period of five days, and more, without any writ, or order of any court, and in disregard of his repeated demands to be given a hearing, was without excuse or palliation. None was offered. It was a palpable and arbitrary abuse of official power. Not having pursued their authority to arrest without warrant, by failing to obtain within a reasonable time, a writ or order for the plaintiff's detention, the defendants placed themselves in the same situation as if they had originally acted without authority. It is a familiar rule that one who abuses an authority given him by law becomes a trespasser *ab initio*.¹

In behalf of the plaintiffs in error, Leger, Miller, and Frank, it is contended that, as they were subordinate officers acting under orders from the chief of the police force in arresting the defendant in error and delivering him into the custody of the patrolmen, who conveyed him to the city prison in obedience to the chief's orders, they should not be held responsible for his subsequent imprisonment, nor for the omission to obtain the necessary warrant and bring him to trial. But the delivery of the plaintiff after his arrest, into the custody of another person, to be by him taken to prison, could not, we think, absolve the arresting officers from the duty required of them to obtain the writ necessary to legalize his further imprisonment. If it could, the imprisonment might with impunity be prolonged indefinitely by the change of custodians and places of confinement, at short intervals. The arrest having been made without

¹ As to this see Gray, J. in *Brock v. Stimson*, 108 Mass. 520 (1871), p. 521, "If he fails to execute or return the process as required, he may not perhaps in the strictest sense be said to be a trespasser *ab initio*; but he is often called such, for his whole justification fails, and he stands as if he never had any authority to take the property" (or seize the plaintiff's person), "and therefore appears to have been a trespasser from the beginning." See also, *Mulberry v. Fuellhart*, 203 Pa. St. 573 (1902), holding that a failure to proceed with the prosecution, as required, being a mere nonfeasance, could not make the original arrest a trespass *ab initio*.

warrant, it was necessary, in order to preserve the legality of that action, that the proper steps should be taken to prevent the further detention of the prisoner from becoming unlawful; for, as we have seen, unless those steps be taken, all legal protection for such arrest ceases, and the arresting officers become wrongdoers from the beginning, liable as such, equally with those by whom the unlawful imprisonment is continued. If the arresting officers choose to rely on some other person to perform that required duty, they take upon themselves the risk of its being performed, and unless it is done in proper time, their liability to the person imprisoned, is in no wise lessened or affected. There was no order of a superior officer in this case that did or could prevent the defendants who made the arrest from complying with the requirement of the law in the respect indicated, nor excuse their omission to comply therewith.

Judgment affirmed.*

(b) Arrest under warrant and seizure of goods under judicial process.

RUSH v. BUCKLEY.

Supreme Judicial Court of Maine, 1905. 100 Maine, 322.

WISWELL, C. J. The plaintiff had been arrested upon two occasions, brought before the Augusta Municipal Court, tried, convicted, sentenced to pay a fine in each case and committed to jail in default of such payment, upon warrants issued by that court. The offense alleged in the complaint and warrant in each case was the violation of an ordinance of the City of Augusta regulating public carriages therein, and which prohibited all persons from driving such a carriage in the City of Augusta without a license therefor, under a penalty therein provided. In these two cases, reported and argued together, the plaintiff sues the judge of the municipal court who issued the warrants, the officer who served them and the persons who made the two complaints, for false imprisonment, upon the ground that the ordinance had never gone into effect, and was void, because it never had been published in some newspaper printed in Augusta as required by the statute authorizing such ordinances. R. S., c. 4, sec. 93, paragraph IX.

Assuming that the ordinance never became effective because of

* *Accord: Burke v. Bell*, 36 Maine 317 (1853); *Linnen v. Banfield*, 114 Mich. 93 (1897); *Burk v. Howley*, 179 Pa. St. 539 (1897); *Newby v. Gunn*, 74 Tex. 455 (1889). See also, *Brock v. Stimson*, 108 Mass. 520 (1871), failure to go on with prosecution, plaintiff released after an hour's detention; *Phillips v. Fadden*, 125 Mass. 198 (1878), where, however, the plaintiff's release was at his own request; *Holley v. Mix*, 3 Wend. 350 (N. Y. 1829), and *Garnier v. Squires*, 62 Kans. 321 (1900), in the first case an officer, in the second a private person, used the arrest to extort the return of money alleged to be stolen; *Richardson v. Dybedahl*, 14 S. Dak. 126 (1900); *Gibson v. Holmes*, 78 Vt. 110 (1905), plaintiff taken to jail in another county.

this failure to publish it, the question presented by the two cases is, whether the judge who issued the warrants, the officer who served them, and the persons who made the complaints upon which they were issued, or either of them, are liable in damages to the plaintiff for this alleged false imprisonment.

As to the liability of the defendants who made the original complaints upon which the warrants were issued: It is settled by an almost unbroken line of authorities, that where a person does no more than to prefer a complaint to a magistrate, in a matter over which the latter has a general jurisdiction, he is not liable in trespass for false imprisonment for the acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction over the particular complaint. *Barker v. Stetson*, 7 Gray, 53; *Langford v. Boston & Albany R. R. Co.*, 144 Mass. 431; *Gifford v. Wiggins*, 50 Minn. 401; *Murphy v. Walters*, 34 Mich. 180; *Teal v. Fissel*, 28 Fed. R. 351. If the complaint is malicious, and without probable cause, the complainant would be answerable in another form of action, and it would be no defense that the acts stated to the magistrate, upon which the warrant was issued, did not constitute a criminal offense. *Finn v. Frink*, 84 Maine, 261. In order for a complainant to be liable in this form of action, whether his motives were malicious or not, he must do something more than merely to make complaint before a magistrate having jurisdiction of the party and over the general subject-matter, by interfering and instigating the officer to enforce the warrant. "The rule is, that if a stranger voluntarily takes upon himself to direct or aid in the service of a bad warrant, or interposes and sets the officer to do execution, he must take care to find a record that will support the process, or he cannot set up and maintain his justification." *Emery v. Hapgood*, 7 Gray, 55.

There is no evidence in this case sufficient to take it out of the general rule as to the liability of the complainants. Neither of these complainants aided or in any way participated in the arrest of the plaintiff upon the warrants or in his commitment to jail after the hearing in default of the payment of the fine imposed. They did not in any way take part in the plaintiff's arrest or commitment, nor did they officiously interfere therewith by giving directions to the officer, or otherwise. It is true, that one of the complainants, when asked by the judge, after the imposition of the fine, as to whether or not he wanted the sentence enforced, replied in the affirmative, but this was no such interference with the service of the warrant of arrest, or of commitment, as should make him liable therefor, and amounted to no more than the making of the original complaint.

As to the liability of the officer: For reasons founded on public policy, and in order to secure a prompt and effective service of legal process, the law protects its officers in the performance of their duties, if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his warrant. He is not to exercise his judgment touching the validity of the process in point of law; but

if it is in due form, and is issued by a court or magistrate apparently having jurisdiction of the case or subject-matter, he is to obey its commands. In such case, he may justify under it although in fact it may have been issued without authority, and therefore be wholly void. *Emery v. Hapgood*, 7 Gray, 55. The theory of the law is to protect an officer in his acts of official duty so far as it reasonably can without injustice to others. The rule should be liberally interpreted in the officer's behalf. *Elsemore v. Longfellow*, 76 Maine, 128. Where the process is in due form and comes from a court of general jurisdiction over the subject-matter, the officer is justified in acting according to its tenor, even if irregularities making the process voidable have previously occurred. *Tellefsen v. Fee*, 168 Mass. 188, wherein numerous cases are cited and considered. Where, however, the process is void on its face, or where the court or magistrate issuing the warrant has no general jurisdiction over the subject-matter, the officer is not protected by his process.

We have numerous illustrations of this latter rule in the reported decisions of this court, some of which may be referred to for the purpose of showing the ground upon which all of these decisions have been based. In *Warren v. Kelley*, 80 Maine, 512, the process commanded the officer to seize a vessel for the purpose of enforcing a lien created by a state statute for repairs upon a vessel. The statute authorizing the enforcement of such a lien by a proceeding in the state court was unconstitutional. The court had no jurisdiction over the subject-matter, which, by the constitution of the United States, was vested in the federal courts. It was therefore held by this court that the officer was not protected by the process, because the process was absolutely void inasmuch as the state court had no jurisdiction over the subject-matter, and, "sufficient appeared upon its face (the process) to show that it was not from a court of competent jurisdiction in reference to the subject-matter."¹

In *Stilphen v. Ulmer*, 88 Maine, 211, the plaintiff resided and

¹ Accord: *Campbell v. Sherman*, 35 Wis. 103 (1874), closely similar facts; *Fisher v. McGirr*, 1 Gray 1 (Mass. 1854), general search warrant issued under act subsequently held unconstitutional; *Sumner v. Beeler*, 50 Ind. 341 (1875), arrest for drunkenness under unconstitutional act; *Ely v. Thompson*, 3 A. K. Marsh. 70 (Ky. 1820); but see *Cottam v. Oregon*, 98 Fed. 570 (C. C. Dist. of Oregon 1899) and *Williams v. Morris*, 22 Ohio Circ. (32 O. C. C. R.) 453 (1911). As to the liability of a party who sues out and directs the execution of process issued in strict compliance with a statute afterwards declared unconstitutional, see *Merris v. St. Paul*, 11 Minn. 223 (1866). So a ministerial officer is not protected by a process of court or command of a superior, even the sovereign, which is prohibited by the constitution, unwritten or written, or, though not prohibited, is beyond the constitutional power of such court or superior, *Entick v. Carrington*, 2 Wils. 275, 19 How. St. Tr. 1029 (1765), general search warrant issued by one of His Majesty's principal Secretaries of State; *Grumon v. Raymond*, 1 Conn. 40 (1814); *Sandford v. Nichols*, 13 Mass. 286 (1816), similar warrants issued by a magistrate; *Wise v. Withers*, 3 Cranch 331 (U. S. 1806), process for collection of fine imposed by Court Martial upon one exempt by the Constitution from military service; *Kilbourn v. Thompson*, 103 U. S. 168 (1880), Sergeant-at-Arms executing order which congressional committee had no power to make.

was arrested in Kennebec County, upon a warrant issued by a trial justice of Knox County for violating the fish and game laws in Lincoln County; the trial justice clearly had no jurisdiction over the subject-matter of the offense, or over the offender, and these facts were apparent upon the face of the warrant, so that the officer who served the process was not protected by it. In *Brown v. Howard*, 86 Maine, 342, the writ under which the officer justified, in an action of trover against him, was void, and the defect was apparent upon the face of the writ and disclosed to the officer a want of jurisdiction. It was therefore held that it afforded him no protection. In *Elsemore v. Longfellow*, 76 Maine, 128, where the court said: "The officer is protected unless the process is void, and unless he can see from the face of the process itself that it is void," the court held that the absolute want of jurisdiction in the magistrate was apparent upon the face of the papers and therefore afforded no protection to the officer who justified thereunder. In *Jacques v. Parks*, 96 Maine, 268, the tax warrant upon which the officer arrested the plaintiff was "upon its face invalid and void." It was therefore held to afford the officer no protection.

It is apparent that in all of these decisions of our own court, some of which are cited and relied upon by counsel for the plaintiff, the officer was held liable because of the fact that the process under which he attempted to justify was void upon its face,² or because the court or magistrate by whom the process was issued had no jurisdiction over the subject-matter, and the process itself clearly showed the want of jurisdiction.³ None of these cases are authority for the proposition that a warrant, fair upon its face, which discloses no defect or want of jurisdiction, and which was in fact issued by a court having general jurisdiction of offenses of like nature, does not afford protection to the officer. Upon the other hand, the doctrine that an officer is protected under such circumstances is abundantly supported by the authorities.

² *Accord: Campbell v. Webb*, 11 Md. 471 (1857), attachment served without the duplicate "short note" required by statute to be served with it; *Sprague v. Birchard*, 1 Wis. 457 (1853), warrant on its face defective; *Clyma v. Kennedy*, 64 Conn. 310 (1894); *mittimus* not stating cause of commitment; *Hazen v. Creller*, 83 Vt. 460 (1910), warrant issued on unsigned complaint attached to it; *Lueck v. Heisler*, 87 Wis. 644 (1894), warrant on which the plaintiff was arrested for obtaining goods under false pretenses stated that the seller knew the falsity of the pretense; *Pearce v. Atwood*, 13 Mass. 324 (1816), warrant issued on Sunday.

³ *Hilbish v. Hower*, 58 Pa. 93 (1868), warrant for school taxes issued by justices of peace instead of school board; *Stephens v. Wilkins*, 6 Pa. 260 (1847), tax warrant issued to improper officer; *Heller v. Clarke*, 121 Wis. 71 (1904), warrant issued by magistrate whose jurisdiction over criminal offenses had by act of legislature been transferred to another tribunal; *Bagnall v. Ableman*, 4 Wis. 163 (1855), arrest for a bailable offense in Wisconsin under warrant commanding the bringing of the person forthwith into the custody of the United States Marshal in Michigan, without giving him opportunity to find bail; and see cases cited by Lathrop, J. in *Tellefsen v. Fee*, *post*. Under the provisions of the Georgia Code, § 2991, an officer who in good faith executes a warrant defective in form or void for want of jurisdiction is not guilty of false imprisonment, *Manning v. Mitchell*, 73 Ga. 660 (1884).

In *Nowell v. Tripp*, 61 Maine, 426, wherein this court held that a collector of taxes was protected by the warrant delivered to him by the assessors, in arresting the plaintiff who had removed to and become a citizen of another town, the court quotes with approval the following language from *Erskine v. Hohnbach*, 14 Wall. 613: "Whatever may have been the conflict at one time in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now, that if the officer or tribunal possesses jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued."⁴

⁴ *Accord: Savacool v. Boughton*, 5 Wend. 170 (N. Y. 1830); *Webber v. Gay*, 24 Wend. 485 (N. Y. 1840); *Champaign County Bank v. Smith*, 7 Ohio St. 42 (1857); *Barnes v. Barber*, 1 Gilm. (6 Ill.) 401 (1844); *McDonald v. Wilkie*, 13 Ill. 22 (1851); *Harmon v. Gould*, Wright 709 (Ohio 1834); *Blanchard v. Goss*, 2 N. H. 491 (1822), failure to acquire jurisdiction over person or lack of jurisdiction because of place where or time when the offense was committed, or the debt contracted; *Marks v. Townsend*, 97 N. Y. 590 (1885), arrest of person previously arrested for same debt; *Holz v. Rediske*, 116 Wis. 353 (1903), process issued by court which had lost jurisdiction by improper adjournments; see also, *Clarke v. May*, 2 Gray 410 (Mass. 1854); and *McIntosh v. Bullard et al.*, 95 Ark. 227 (1910); *Andrews v. Marris*, 1 Ad. & E. (N. S.) 3 (1841), execution personally issued by clerk of court of requests on default of payment of money ordered to be paid in instalments, the clerk having no authority to issue execution for such defaults except on order of the commissioners; *Paul v. Van Kirk*, 6 Binney 123 (Pa. 1813), joint execution issued on separate judgments; *Jennings v. Thompson*, 54 N. J. L. 55 (1891), writ not conforming to order of the court; *Babe v. Coyne*, 53 Cal. 261 (1878); *Garnet v. Wimp*, 3 B. Mon. 360 (Ky. 1843); *Cody v. Quinn*, 6 Ire. (Law) 191 (N. Car. 1845); *Billings v. Russell*, 23 Pa. 189 (1854); *Kelsey v. Klambunde*, 54 Nebr. 760 (1898), defects in affidavits, bonds or other irregularities which render void, or voidable, or afford a defense to, the proceedings in which the process was issued, and this though the process is subsequently vacated, *Coleman v. Brown*, 126 App. Div. 44 (N. Y. 1908); *Chase v. Ingalls*, 97 Mass. 524 (1867), magistrate issuing warrant was also the attorney who drew the writ; *Watson v. Watson*, 9 Conn. 140 (1832), writ of replevin for animal never impounded; *Barnett v. Reed*, 51 Pa. St. 190 (1865), execution on judgment issued after the debt had been paid; *Carle v. Delesdernier*, 13 Maine 363 (1836), and *Woods v. Davis*, 34 N. H. 328 (1857), arrest of persons privileged from arrest; see also, cases cited by Lathrop and Knowlton, JJ. in *Tellefsen v. Fee*, *post*. The immunity of a sheriff attaching goods does not depend on the successful prosecution or validity of the action in which it issued, *Livingston v. Smith*, 5 Pet. 90 (U. S. 1831); *Jackson v. Kimball*, 121 Mass. 204 (1876), original action discontinued; *Rice v. Miller*, 70 Tex. 613 (1888), sheriff knew the action was brought maliciously and without sufficient

The case of *Hofschulte v. Doe*, 78 Fed. R. 436, is very much in point and contains a full discussion of this question. It was there decided that when a court which, though of inferior and local jurisdiction, has general jurisdiction with respect to the violation of the ordinances of the town, entertains a complaint under such an ordinance, and thereupon issues process, fair on its face, to an officer, the process is a justification to the officer in doing the acts thereby required, notwithstanding the ordinance under which the court acts is invalid, and that no action lies against an officer for the acts done by him pursuant to such process.

In accordance with these general principles it is clear that the officer who served these warrants upon the plaintiff is not liable in damages to him, even if the ordinance upon which the complaints and warrants were based had never gone into effect for the reason before stated. The warrants were issued by the judge of the municipal court of the city of Augusta, which court had general jurisdiction over the subject-matter of the violation of city ordinances. When we speak of a court as having jurisdiction over the subject-matter, we mean, as said in *State v. Neville*, 110 Mo. 345, 19 S. W. 491, "the power to hear and determine cases of the general class to which the proceeding in question belongs." The complaints were for the violation of a city ordinance in regard to the regulation of public carriages. The city had power to pass such an ordinance, express authority therefor being given by the statute R. S., c. 4, sec. 93, paragraph 9. This ordinance was duly passed by the city government, and only claimed to be invalid or ineffective

grounds; *Lashus v. Matthews*, 75 Maine 446 (1883), *aliter* where the seizure under an attachment or execution of goods, *prima facie* the property of a stranger to the writ, is justified on the ground that they have been transferred to such stranger by the defendant in the writ in fraud of his creditors, or are otherwise liable for the payment of his debts, as in *Miller v. Bannister*, 109 Mass. 289 (1871), in which case the sheriff must show, by judgment rendered in favor of the plaintiff in the writ or otherwise, that the debt is actually due, *Damon v. Bryant*, 2 Pick. 411 (Mass. 1824); *Sexey v. Adkinson*, 34 Cal. 346 (1867); *Cook v. Hopper*, 23 Mich. 511 (1871); *Cross v. Phelps*, 16 Barb. 502 (N. Y. 1853). In the following cases officers, serving tax warrants "fair" on their face, have been held protected, though the tax was levied on property improperly listed, *Hill v. Figley*, 25 Ill. 156 (1860); *Bird v. Perkins*, 33 Mich. 28 (1875); *Moore v. Allegheny*, 18 Pa. 55 (1851); *St. Louis Mut. Life Ins. Co. v. Charles*, 47 Mo. 462 (1871); *Walden v. Dudley*, 49 Mo. 419 (1872); or on a person not liable to assessment, as a nonresident, *Kelley v. Noyes*, 43 N. H. 209 (1861); or where the tax was invalid because of the absence of some condition precedent to the right to assess it, *Cunningham v. Mitchell*, 67 Pa. 78 (1870) with which compare *Leachman v. Dougherty*, 81 Ill. 324 (1876). See also, *Matthews v. Densmore*, 109 U. S. 216 (1883); *Oswalt v. Smith*, 97 Ala. 627 (1893); *Goodwine v. Stephens*, 63 Ind. 112 (1878); *Stoddard v. Tarbell*, 20 Vt. 321 (1848).

The protection generally given an officer by process regular on its face does not extend to a case where "the officer attempts to overthrow a sale by the debtor on the ground of fraud." "He must go back of his process and show authority for issuing it. If he act under an execution, he must show a judgment; and if he seizes under an attachment, he must show the attachment regularly issued"—*Noble v. Holmes*, 5 Hill 194 (N. Y. 1843); *Matthews v. Densmore*, 43 Mich. 461 (1880), reversed in 109 U. S. 216 (1883); *Hines v. Chambers*, 29 Minn. 7 (1882); *Williams v. Eikenberry*, 25 Nebr. 721 (1889).

because it was never published in some newspaper printed in the city as required by the statute referred to. The warrants contained nothing upon their face to indicate that the court which issued them, and which had general jurisdiction over the subject-matter, did not have jurisdiction over this particular offense, or that the facts stated in the complaint did not constitute an offense because of this failure to comply with the preliminary requisite as to publication. If it were necessary for an officer, before serving a warrant issued by such a court, having general jurisdiction of offenses of this nature, and over the alleged offender, to first make inquiries as to whether all of the necessary preliminaries necessary to make a city ordinance effective had been complied with, it would cause intolerable delay and very seriously interfere with the efficient administration of the criminal laws. The ministerial officer is bound to know the jurisdiction of the court which issues process to him, he is bound to know whether, from constitutional or other reasons, the court has jurisdiction over offenses of that nature, but he is not bound to inquire into the question of fact as to whether or not a city ordinance in relation to a subject-matter, concerning which the city is by statute authorized to pass ordinances, has been published as required by the statute.⁵

TELLEFSEN v. FEE.

Supreme Judicial Court of Massachusetts, 1897. 168 Mass. 188.

LATHROP, J. The Municipal Court of the city of Boston had no jurisdiction of the action brought against the plaintiff in this case for wages alleged to be due one Johnson, and the writ upon which the plaintiff was arrested on mesne process was of no effect.

It appears, therefore,¹ that the consul of Sweden and Norway had exclusive jurisdiction of the controversy or difference between Johnson and Tellefsen, and that the Municipal Court of the city of Boston had no jurisdiction either of the subject-matter or of the persons of the parties in the action which the seaman saw fit to bring against the master. The officer who arrested the master was therefore acting illegally and without justification, and is liable in this action, unless he is protected by virtue of his writ. This presents a question of some difficulty and one which is not wholly free from doubt.

Before proceeding to consider the principal question, it may be well to state briefly certain principles laid down by the courts in regard to which there is little or no dispute.

Where the process is in due form and comes from a court of general jurisdiction over the subject-matter, the officer is justified

⁵ *Henke v. McCord*, 55 Iowa 379 (1880), warrant issued to enforce an ordinance outside the powers conferred by the state upon the municipality enacting it, and see *Walden v. Dudley*, 49 Mo. 419 (1872).

¹ By virtue of § 13 of the treaty of 1827 between the United States and Sweden and Norway, 8 U. S. Statutes, 346-352.

in acting according to its tenor, even if irregularities making the process voidable have previously occurred. *Savacool v. Boughton*, 5 Wend. 170; *Earl v. Camp*, 16 Wend. 562; *Ela v. Shepard*, 32 N. H. 277; *Howard v. Proctor*, 7 Gray, 128; *Dwinnels v. Boynton*, 3 Allen, 310; *Chase v. Ingalls*, 97 Mass. 524; *Hubbard v. Garfield*, 102 Mass. 72; *Bergen v. Hayward*, 102 Mass. 414; *Rawson v. Spencer*, 113 Mass. 40; *Chesebro v. Barme*, 163 Mass. 79, 82; *Hines v. Chambers*, 29 Minn. 7; *Hann v. Lloyd*, 21 Vroom, 1.

Where, however, the process is void on its face, the officer is not protected. *Clark v. Woods*, 2 Exch. 395. *Pearce v. Atwood*, 13 Mass. 324. *Eames v. Johnson*, 4 Allen, 382. *Thurston v. Adams*, 41 Maine, 419. *Harwood v. Siphers*, 70 Maine, 464. *Brown v. Howard*, 86 Maine, 342. *Rosen v. Fischel*, 44 Conn. 371. *Frazier v. Turner*, 76 Wis. 562. *Sheldon v. Hill*, 33 Mich. 171. *Poulk v. Slocum*, 3 Blackf. 421.

An officer is bound to know the law, and to know the jurisdiction of the court whose officer he is; if, therefore, he does an act in obedience to a precept of the court, and the court has no jurisdiction in the matter, either because the statute under which the court acted is unconstitutional, or there is a want of jurisdiction for any other reason, it would seem that the officer is not protected. There are many authorities to this effect. *Fisher v. McGirr*, 1 Gray, 1, 45. *Warren v. Kelley*, 80 Maine, 512. *Batchelder v. Currier*, 45 N. H. 460. *Thurston v. Martin*, 5 Mason, 497. *Campbell v. Sherman*, 35 Wis. 103. *Sumner v. Beeler*, 50 Ind. 341. *The Marshalsea*, 10 Rep. 68 b. *Crepps v. Durden*, Cowp. 640. *Brown v. Compton*, 8 T. R. 424. *Watson v. Bodell*, 14 M. & W. 57.²

Whether this doctrine applies to a case like the present, where the court had general jurisdiction over the subject-matter, but no jurisdiction over the particular controversy between the parties, and no jurisdiction over their persons, we need not decide, because on the facts in this case we are of opinion that the officer may be held liable.

He was informed before making the arrest that the vessel was a Norwegian vessel, and the captain of the vessel a Norwegian, and that the claim of Johnson would be adjusted at the consulate of the Kingdom of Sweden and Norway. Being informed of the facts, he was bound to know the law, that the court had no jurisdiction over the person of the captain or the subject-matter of the action. *Sprague v. Birchard*, 1 Wis. 457, 464, 469. *Grace v. Mitchell*, 31 Wis. 533, 539, 545. *Leachman v. Dougherty*, 81 Ill. 324, 327, 328.³

There are, without doubt, cases which lay down a more stringent rule, and say that the officer need not look beyond his precept, and is not bound to take notice of extrinsic facts; but all of these are cases which are distinguishable from the case at bar. The leading case on this subject is *People v. Warren*, 5 Hill (N. Y.) 440. The defendant was indicted for assaulting an officer. The in-

² Note that in all of these cases lack of jurisdiction was apparent on the face of the process.

³ See Gould, C. J. in *Tierney v. Frazier*, 57 Tex. 437 (1882), p. 440.

spectors of an election issued a warrant to a constable for the arrest of the defendant, for interrupting the proceedings at the election by disorderly conduct in the presence of the inspectors. The defendant offered to show that he had not been in the presence of the inspectors at any time during the election, and that the constable knew it. This was held to be rightly excluded. The opinion is *per curiam*, and is very brief. While it says that the inspectors had no jurisdiction of the subject-matter, yet the clear meaning is, that, if the defendant was not in their presence, they acted in excess of their jurisdiction. Knowledge by an officer that a man was innocent would of course be no excuse for assaulting the officer, if he arrested the man upon a warrant from a court of competent jurisdiction. An officer in a criminal case is obliged to obey his warrant, whatever his knowledge may be. This disposes also of the case of *State v. Weed*, 21 N. H. 262.

Several cases have been called to our attention in which there are dicta to the effect that an officer is not bound to look beyond his precept, even if he has knowledge that the court has no jurisdiction; but an examination of these cases shows that the facts known to the officer did not affect the jurisdiction of the court, but related to irregularities in the prior proceedings, or to matters merely of defence to the action. See cases above cited.

Of course, where the court has jurisdiction of the subject-matter and of the parties to an action, knowledge on the part of the officer, or information to him that there is some irregularity in the proceeding can make no difference. *Underwood v. Robinson*, 106 Mass. 296.⁴ Nor can it make any difference that the officer is informed that there is a defence to the action, such as that the defendant has a receipt; *Twitchell v. Shaw*, 10 Cush. 46; or a discharge in insolvency; *Wilmarth v. Burt*, 7 Met. 257;⁵ or that the defendant is an infant; *Cassier v. Fales*, 139 Mass. 461.⁶

But the question of jurisdiction is a more serious matter, and if facts are brought to the attention of the officer about which he can have no reasonable doubt, and he knows, or is bound to know, that on these facts the court has no jurisdiction of the controversy, he may well be held to proceed at his peril.

We can see no hardship upon the officer in holding him responsible in this case for an illegal arrest and for false imprisonment. If an officer has reasonable cause to doubt the lawfulness of an ar-

⁴The magistrate who took the affidavit and signed the certificate as attorney for the plaintiff made out the writ and it was held that the officer was not bound by his familiarity with the magistrate's writing to take notice of resulting invalidity of the writ.

⁵*Twitchell v. Shaw* and *Witmarsh v. Burt* are relied upon by Sheldon, J. in *Leachman v. Dougherty*, as authority for his dissent therein.

⁶Accord: *O'Shaughnessy v. Baxter*, 121 Mass. 515 (1877), the officer, who arrested the person named in and intended by the writ of execution, knew that the note on which the action was brought was signed by another person of the same name; *Rice v. Miller*, 70 Tex. 613 (1888), sheriff attaching goods knew the insufficiency of the original cause of action and that it had been brought maliciously; see also, *Woods v. Davis*, 34 N. H. 328 (1857), arrest of person privileged therefrom, *semble*.

rest, he may demand from the plaintiff a bond of indemnity, and so save himself harmless. *Marsh v. Gold*, 2 Pick. 285, 290. We are not aware that this case has ever been doubted; and in practice, bonds of indemnity have often been required.

In the case at bar, after receiving full information, he chose to proceed, and, in defiance of the treaty, to subject the subject of a foreign nation to a gross indignity, for the purpose of extorting money from him, under the guise of a precept which the court had no jurisdiction to issue, and which it would not have issued had the facts been before it.

We approve of the language of Mr. Freeman in 21 Am. Dec. 204, where, after a discussion of the cases bearing upon the question of the liability of an officer, he says: "We apprehend, at all events, that the protection of process cannot so far extend as to protect an officer who, from all the circumstances of the case, does not appear to have acted in good faith, and whose conduct shows that his eyes were wilfully closed to enable him not to see and know that he was a too ready instrument in the perpetration of a grievous wrong."

In the opinion of a majority of the court, the instruction requested should have been given.

Exceptions sustained.

KNOWLTON, J. It seems to me that the opinion of the majority of the court is wrong in holding that the defendant was bound to receive statements made by the plaintiff or others for the purpose of determining whether he could lawfully serve a writ which was regular in form, and which on its face showed a case within the jurisdiction of the court. The exceptions on this point present a naked proposition of law, and raise no question in regard to the good faith of the defendant in performing his official duty. The writ which he served stated an ordinary case for the collection of a debt. An officer is bound to know the law, even to the extent of determining whether a statute on which his process is founded is or is not constitutional. But for the facts, he is not called upon to take the testimony of anybody in regard to anything outside of the statements contained in the process, nor even to act upon what he believes to be his own knowledge. The jurisdiction which the court must have in order to justify him is jurisdiction of the case stated in the writ. It may turn out that there was no real case upon which to issue a writ, and that the prosecution is grossly malicious, or that there is a real case materially different from that stated, and which does not come within the jurisdiction of the court, but the officer is not bound to inquire into matters of this kind. This has been held in a great many cases in Massachusetts and elsewhere, and the reasons for the rule have been elaborately stated in different jurisdictions. These reasons seem to me fully to cover the present case. *Twitchell v. Shaw*, 10 Cush. 46. *Wilmarth v. Burt*, 7 Met. 257. *Donahoe v. Shed*, 8 Met. 326. *Fisher v. McGirr*, 1 Gray, 1, 45. *Clarke v. May*, 2 Gray, 410. *Chase v. Ingalls*, 97 Mass. 524. *Underwood v. Robinson*, 106 Mass. 296, 297. *Rawson v. Spencer*, 113 Mass. 40, 46.

Cassier v. Fales, 139 Mass. 461. *State v. Weed*, 21 N. H. 262. *Batchelder v. Currier*, 45 N. H. 460. *Watson v. Watson*, 9 Conn. 140. *Warren v. Kelley*, 80 Maine, 512, 531. *Earl v. Camp*, 16 Wend. 562. *Webber v. Gay*, 24 Wend. 485. *People v. Warren*, 5 Hill (N. Y.) 440. *Hann v. Lloyd*, 21 Vroom, 1. *Taylor v. Alexander*, 6 Ohio, 144, 147. *Henline v. Reese*, 54 Ohio St. 599. *Wall v. Trumbull*, 16 Mich. 228, 234.¹

The cases in Wisconsin and Illinois cited in the opinion are the only ones that I have been able to find, after considerable investigation, which hold a different doctrine. On the authorities cited above I am unable to see that it makes any difference whether the outside information communicated to the officer, if taken to be true, would show the real case to be one upon which such a precept cannot properly be issued, because it comes within a treaty giving exclusive jurisdiction to another tribunal, or would show the precept to be unwarranted for any one of numerous other causes. That the defendant in the original action happens to be a captain of a Norwegian ship, and to owe the plaintiff in his official capacity, gives him a privilege of which he may or may not avail himself to take the case out of the general jurisdiction of the court. I think this fact calls for the application of the same principle as a strictly personal privilege. Indeed, the principle of the case seems to cover every kind of external fact which operates to take away a jurisdiction that appears to be perfect on the face of the papers.

It has been held that an officer may, if he chooses, act upon his knowledge or information of actual facts which show that the court was without jurisdiction, and refuse to serve the writ. *Earl v. Camp*, 16 Wend. 562. *Henline v. Reese*, 54 Ohio St. 599. But this is very different from requiring him, at his peril, to determine questions of fact. I think the exceptions should be overruled.

BUCK v. COLBATH.

Supreme Court of the United States, 1865. 70 U. S. 334.

Colbath sued Buck in one of the State courts of Minnesota, in an action of *trespass* for taking goods. Buck pleaded in defence, that he was *marshal of the United States* for the district of Minnesota, and that having in his hands a writ of attachment against certain parties whom he named, he levied the same upon the goods, for taking which he was now sued by Colbath. *But he did not aver that they were the goods of the defendants in the writ of attachment.*

On the trial Colbath made proof of his ownership of the goods, and Buck relied *solely on the fact that he was marshal* and held the goods under the writ in the attachment suit.

The court refused to instruct the jury that the defence thus set

¹ *Accord: Tierney v. Frazier*, 57 Tex. 437 (1882), facts closely similar to *Twitchell v. Shaw*; *Rainey v. State*, 20 Tex. App. 455 (1886), defects in affidavits and bond making a writ of attachment void; *Marks v. Sullivan*, 9 Utah 12 (1893); and see *Bird v. Perkins*, 33 Mich. 28 (1875).

up was a sufficient one; and the plaintiff had a verdict and judgment. The judgment was affirmed on error in the Supreme Court of Minnesota, and the defendant brought the case here under the 25th section of the Judiciary Act.

MR. JUSTICE MILLER. How far the courts are bound to interfere for the protection of their own officers is a question not discussed in the case of *Freeman v. Howe*,¹ but which demands a passing notice here. In its consideration, however, we are reminded at the outset, that property may be seized by an officer of the court under a variety of writs, orders, or processes of the court. For our present purpose, these may be divided into two classes:

1. Those in which the process or order of the court describe the property to be seized, and which contain a direct command to the officer to take possession of that particular property. Of this class are the writ of replevin at common law, orders of sequestration in chancery, and nearly all the processes of the admiralty courts, by which the *res* is brought before it for its action.

2. Those in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any specific property to be thus taken. Of this class are the writ of attachment, or other mesne process, by which property is seized before judgment to answer to such judgment when rendered, and the final process of execution, *elegit*, or other writ, by which an ordinary judgment is carried into effect.

It is obvious on a moment's consideration, that the claim of the officer executing these writs, to the protection of the courts from which they issue, stands upon very different grounds in the two classes of process just described. In the first class he has no discretion to use, no judgment to exercise, no duty to perform but to seize the property described. It follows from this, as a rule of law of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ of process is a complete protection to him, not only in the court which issued it, but in all other courts.²

In the other class of writs to which we have referred, the officer has a very large and important field for the exercise of his judgment and discretion. *First*, in ascertaining that the property on which he proposes to levy, is the property of the person against whom the writ is directed; *secondly*, that it is property which, by law, is sub-

¹ In *Freeman v. Howe*, 24 How. 450 (U. S. 1860), it had been decided that a United States marshal having levied a writ of attachment in an action in a Federal Court, upon goods of one a stranger to the writ, the rightful owner could not obtain possession of them by a writ of replevin issued by a State Court, since to allow it would lead "to endless strife" "between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit."

² *Accord*: As to the seizing of the very property named in writ of replevin, *Watson v. Watson*, 9 Conn. 140 (1832), but the officer is liable if he seizes property not named therein, *Kane v. Hutchisson*, 93 Mich. 488 (1892).

ject to be taken under the writ; and *thirdly*, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else.

In the case before us, the writ under which the defendant justified his act and now claims our protection, belongs to this latter class. Yet the plea on which he relied contains no denial that the property seized was the property of plaintiff, nor any averment that it was the property of either of the defendants in the attachment suit, or that it was in any other manner subject to be taken under the writ.

We see nothing therefore in the mere fact that the writ issued from the Federal court, to prevent the marshal from being sued in the State court, in trespass for his own tort, in levying it upon the property of a man against whom the writ did not run, and on property which was not liable to it.

Judgment affirmed with costs.*

SECTION 4.

Right to Institute Legal Proceedings for the Punishment of Crime or for Private Redress

(a) Malicious prosecution.

(1) Institution of proceedings and their termination.

HALBERSTADT v. NEW YORK LIFE INSURANCE CO.

Court of Appeals of New York, 1909. 194 New York Reports, 1.

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 8, 1908, which reversed an interlocutory judgment of Spe-

* *Sanderson v. Baker*, 2 Wm. Black. 832 (1771), A's goods seized on a *fi. fa.* against B.; *Glasspoole v. Young*, 9 B. & C. 696 (1829), female plaintiff's goods seized under a *fi. fa.* against one M., who had gone through a form of marriage with the plaintiff. She, believing the marriage valid and the property in the goods transferred thereby to M., acquiesced in the seizure. It was held that on discovering the marriage to be invalid, she might maintain trover

cial Term sustaining a demurrer to the second and third defenses of the answer and overruled such demurrer.

The action is brought to recover damages for an alleged malicious prosecution claimed to have been instituted by the respondent against the appellant in Mexico. It is in the complaint, amongst other things, alleged that the respondent through its agent in the Criminal Court in the city of Mexico charged the appellant with the crime of embezzlement "and thereupon and in and by virtue of said charge and the institution of said criminal proceedings a warrant was issued by said court for the arrest of the plaintiff (in this action)," and that thereafter "the said criminal proceedings for the punishment of said plaintiff were dismissed and extinguished and the said prosecution was thereby wholly determined * * * in favor of the plaintiff."

The respondent, by its second defense, which is challenged here for insufficiency, alleged, in substance, that before the warrant referred to in the complaint could be served upon the appellant and before he could be apprehended, "he left the Republic of Mexico, and thereby continuously remained absent * * * and by such absence avoided being arrested under such warrant, or being tried * * * but remained absent from said Republic of Mexico for a sufficient period of time to enable him to procure the dismissal of said proceedings under the law of Mexico on account solely of the lapse of time," and, conversely, that said criminal proceedings "were not dismissed on account of a determination of the case in favor of the plaintiff on the trial thereof on the merits, nor was it dismissed for failure to prosecute said case except as above set forth, nor was it dismissed on account of any withdrawal of the complaint."

The third defense, also challenged, (was substantially the same) repeats the foregoing allegations and alleges that "the departure of the plaintiff * * * was for the purpose of avoiding arrest, and by so absconding the said plaintiff did avoid arrest," and in substance that he did so for the purpose and with the result of procuring a dismissal of the criminal proceedings in accordance with the laws of Mexico on account of the lapse of time alone, and "by reason of the premises said plaintiff could not be brought to trial and was never tried in said court to answer said charge."

HISCOCK, J. This appeal involves interesting questions in an action for malicious prosecution raised by demurrer to certain affirmative defenses which have been pleaded.

against the sheriff; *North v. Peters*, 138 U. S. 271 (1890), injunction granted to compel sheriff to release goods and restraining him from further levy thereon; *People ex rel. Kellogg v. Schuyler*, 4 Coms. 173 (N. Y. 1850); *Ball v. Pratt*, 36 Barb. 402 (N. Y. 1862); *Heidenheimer v. Sides*, 67 Tex. 32 (1886); and see *Miller v. Commonwealth*, 5 Pa. 294 (1847).

So an officer executing a warrant, or a jailor receiving a prisoner from him, is bound at his peril to arrest the person named therein, *Aaron v. Alexander*, 3 Camp. 35 (1811); *Griswold v. Sedgwick*, 6 Cow. 456 (N. Y. 1826), 1 Wend. 126 (1828); *Mead v. Haws*, 7 Cow. 332 (1827); *Miller v. Foley*, 28 Barb. 630 (N. Y. 1859); *Hays v. Creary*, 60 Tex. 445 (1883); *Landrum v. Wells*, 7 Tex. Civ. App. 625 (1894).

The respondent's first reply to the appellant's attack upon its answer is of the *tu quibque* nature, it insisting that the complaint is as deficient in the statement of a good cause of action as the answer is alleged to be in the statement of a good defense. This contention is based upon the fact that the complaint does not allege any act subsequent or in addition to the mere issuance of a warrant in the criminal proceeding complained of; does not allege that the warrant was ever executed in any way whatever, or that the appellant was ever brought into said proceedings either by force of process or voluntary appearance. Therefore, the question is presented whether the mere application for and issuance to a proper officer for the execution of a warrant on a criminal charge may institute and constitute such a prosecution as may be made the basis of a subsequent civil action by the party claimed to have been injured. In considering this question we must keep in mind that the facts alleged in the complaint, and in the light of which it is to be determined, do not show, as the answer does, that the defendant in those proceedings was beyond the jurisdiction of the court.

This question does not seem to have been settled by any decision which we regard as controlling on us.

The respondent cites the following authorities deciding it in the negative: *Newfield v. Copperman* (Spl. Term) (15 Abb. Pr. (N. S.) 360); *Lawyer v. Loomis* (3 T. & C. 393); *Cooper v. Armour* (42 Fed. Repr. 215); *Heyward v. Cuthbert* (4 McCord (S. C.) 354); *O'Driscoll v. McBurney* (2 Nott & McCord (S. C.) 54); *Bartlett v. Christliff* (14 Atlantic Repr. 518); *Gregory v. Derby* (8 C. & P. 749); *Paul v. Fargo* (84 App. Div. 9).¹

The case last cited was concerned with an alleged malicious prosecution by means of civil process and what was there said must be interpreted with reference to that fact, and thus interpreted it is not applicable here. Of the other cases, only two, *Heyward v. Cuthbert* and *Cooper v. Armour*, considered the question here involved with sufficient thoroughness to require brief comment. An examination will show that the decision in each of them rested in whole or in part on a principle not, as I believe, adopted in this state. In the former it was said that "The foundation of this sort of action is the wrong done to the plaintiff by the direct detention or imprisonment of his person." As I think we shall see hereafter,

¹ See also, *Davis v. Sanders*, 133 Ala. 275 (1901), *semble*, "an averment of the issuance of process, properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof, is essential in an action of malicious prosecution." In *Mitchell v. Donanski*, 28 R. I. 94 (1906), the defendant obtained a warrant against the plaintiff charging him with conduct not constituting any crime, the warrant was never served, the defendant voluntarily directing the officer not to serve it, dismissing that complaint and paying the costs, it was held that no action lay, citing *Byne v. Moore*, 5 Taunt. 187, 1 Marsh. 12 (1813), where a plaintiff, who proved that a bill of indictment was presented to the grand jury and not found, was held to have no action since he proved no damage, the indictment not containing scandal nor the charge putting the plaintiff to any expense. But in *Mitchell v. Donanski*, it is intimated, p. 97, that such a charge of a criminal offence, actionable *per se* (in slander) or putting the accused to special damage might support an action.

that is not a correct statement of the law in this state. In the other case it was stated, "The only injury sustained by the person accused, when he is not taken into custody, and no process has been issued against him, is to his reputation; and for such an injury the action of libel or slander is the appropriate remedy, and would seem to be the only remedy." I think that this doctrine, which if correct would provide an adequate remedy outside of an action for malicious prosecution for an injured party in a case where no warrant had been executed, also is opposed to the weight of authority both in this state and elsewhere hereafter to be referred to.

The authorities holding to the contrary on the question above stated, and that the execution of the warrant is not necessary to lay the foundation for an action of malicious prosecution, are: Addison on Torts (Vol. 2 (4th Eng. Ed.), p. 478); Newell on Malicious Prosecution (sect. 30); Stephens on Malicious Prosecution (Am. Ed., sect. 8); *Stapp v. Partlow* (Dudley's Repts. (Ga.) 176); *Clark v. Postan* (6 C. & P. 423); *Feazle v. Simpson* (2 Ill. 30); *Britton v. Granger* (13 Ohio Cir. Ct. Repts. 281, 291); *Holmes v. Johnson* (Busbee's L. R. (N. C.) 44); *Coffey v. Myers* (84 Ind. 105).

And to the like effect in the absence of special statutory provisions is *Swift v. Witchard* (103 Ga. 193).

Thus it is apparent, as before stated, that there is no controlling decision on this question and we are remitted to a search for some general considerations which may be decisive. It seems to me that these may be found and that they favor the view that a prosecution may be regarded as having been instituted though a warrant has not been executed.

The first one of these considerations is found in the rule applied in civil actions and proceedings to an analogous situation. There it has many times been held that the mere issue of various forms of civil process for service or other execution is sufficiently independent of statute to effect the commencement of a case or proceeding.²

I see no reason why a similar rule should be applied to criminal proceedings, at least for the purpose of such an action as this.

Then there is another reason resting on justice which seems to me to lead us to adopt this conclusion. In opposition to what was said in the South Carolina case already referred to, the sole foundation for an action of malicious prosecution is not "the wrong done to the plaintiff by the direct detention or imprisonment of his person." In an action for false imprisonment that would be so. But in an action of the present type, the substantial injury for which damages are recovered and which serves as a basis for the action may be that inflicted upon the feelings, reputation and character by a false accusation as well as that caused by arrest and imprison-

² Citing *Carpenter v. Butterfield*, 3 Johns. Cases, 145 (N. Y. 1802); *Cheet- ham v. Lewis*, 3 Johns. 42 (N. Y. 1808); *Bronson v. Earl*, 17 Johns. 63 (N. Y. 1819); *Ross v. Luther*, 4 Cow. 158 (N. Y. 1825); *Mills v. Corbett*, 8 How. Pr. 500 (N. Y. 1853); *Hancock v. Ritchie*, 11 Ind. 48, 52 (1858); *Howell v. Shep- ard*, 48 Mich. 472 (1882); *Webster v. Sharpe*, 116 N. Car. 466, 471 (1895).

ment. This element "indeed is in many cases the gravamen of the action." (*Sheldon v. Carpenter*, 4 N. Y. 579, 580; *Woods v. Finnell*, 13 Bush (Ky.) Repts. 628; *Townsend on Slander*, sec. 420; *Wheeler v. Hanson*, 161 Mass. 370; *Gundermann v. Buschner*, 73 Ill. App. 180; *Lawrence v. Hagerman*, 56 Ill. 68; *Davis v. Seeley*, 91 Iowa 583.)

But no matter how false and damaging the charge may be in a criminal proceeding upon which a warrant may be issued, damages for the injury caused thereby can not under any ordinary circumstances be recovered in an action for libel or slander.³

Therefore, it follows that a person who has most grievously injured another by falsely making a serious criminal accusation against him whereon a warrant has been actually issued, may escape all liability by procuring the warrant to be withheld unless an action for malicious prosecution will lie. It seems to me that under such circumstances we should hold that such action will lie, if for no other reason than to satisfy that principle of law which demands an adequate remedy for every legal wrong.

Deciding, therefore, that the appellant's complaint does state a cause of action, we are brought to the direct consideration of the respondent's answer. I do not think that there is such substantial difference between the two defenses which are questioned as calls for any separate treatment of them. Liberally construed, as the pleader is entitled to have them in the face of a demurrer, each one amounts to this, that the appellant fled from Mexico before the warrant could be served on him for the purpose of avoiding service, and remained out of the country and beyond the jurisdiction of the court for such a length of time that the criminal proceeding was finally dismissed, presumably because prosecution was not and could not be carried on. The question is whether a dismissal or discontinuance of a criminal proceeding under such circumstances is that kind of a termination which will support an action for malicious prosecution. If it is, the answers are bad; otherwise, not.

While it is elementary that a criminal proceeding must be terminated before an action for malicious prosecution can be begun,⁴

³ Citing *Howard v. Thompson*, 21 Wend. 319, 324 (N. Y. 1839); *Woods v. Wiman*, 47 Hun 362, 364 (N. Y. 1866); *Sheldon v. Carpenter*, 4 N. Y. 579, 580 (1851); *Dale v. Harris*, 109 Mass. 193 (1872); *Gabriel v. McMullin*, 127 Iowa 426 (1905); *Hamilton v. Eno*, 81 N. Y. 116 (1880); *Newell on Malicious Prosecution*, sec. 10.

⁴ "Otherwise he might recover in the action and yet be convicted in the original prosecution", *Fisher v. Bristow*, 1 Douglas 215 (1779), and see cases cited in note to *Graves v. Scott*, 2 L. R. A. N. S. 927 (1905), pp. 927-928. Therefore the statute of limitations does not run until the original prosecution is terminated, *Rider v. Kite*, 61 N. J. L. 8 (1897). This is equally so in an action for the malicious prosecution of civil actions and for the same reason, *Bonney v. King*, 103 Ill. App. 601 (1902), 201 Ill. 47 (1903); *Wilson v. Hale*, 178 Mass. 111 (1901). But if the nature of the proceeding is such that the plaintiff has no opportunity to make a defense and it is thus impossible for the proceedings to terminate in his favor, as where the proceedings are *ex parte* and the court or magistrate has no discretion but acts as it were ministerially upon the defendant's complaint, an action will lie if the proceedings are without probable cause and malicious, *Steward v. Gromett*. 7 C.

there has been much discussion of the nature of this necessary termination. The best idea of what is essential may be gathered by reference to some pertinent authorities.

In *Wilkinson v. Howell* (22 E. C. L. R. 368; 1 M. & M. N. P. 495) it appeared that the court in the criminal proceeding complained of had ordered a *stet processus* with the consent of the parties. It was said by Lord Tenterden, "That the termination (of the criminal proceeding) must be such as to furnish *prima facie* evidence that the action was without foundation," and that the termination in question did not furnish any such evidence.⁵

In *McCormick v. Sisson* (7 Cowen, 715, 717) criminal proceedings were suspended because the parties declared that they had settled all matters of difficulty between them. The court held that there was no proper termination of the proceeding, saying: "It is essential that the plaintiff prove he has been acquitted. The discharge must be in consequence of the acquittal. The action can not be sustained unless the proceedings are at an end by reason of an acquittal."

In *Gallagher v. Stoddard* (47 Hun, 101) it appeared that the plaintiff, after being arrested, paid the officer having him in custody some money, which was receipted for by the defendant and the officer, and he was thereupon discharged. It was held that this was not enough.

In *Atwood v. Beirne* (73 Hun, 547) it appeared that there had been cross-criminal proceedings and it was arranged that the respective complainants should be absent on the days to which the proceedings were adjourned and each complaint thus fell for want of prosecution. It was held that this was not a sufficient termination to support a subsequent action for malicious prosecution.

In *Jones v. Foster* (43 App. Div. 33, 35) it was said that the theory on which such an action as this is sustainable "is that the proceeding out of which the action arose has terminated successfully to the defendant, exonerating him from the charge made."

In *Leyenberger v. Paul* (40 Ill. App. 516) it was established that there had been an adjournment of the criminal proceedings to a certain day and that the attorney for the defendant in that pro-

B. (N. S.) 191 (1859), peace warrant issued on information before a magistrate that the plaintiff had used threatening language, *Hyde v. Greuch*, 62 Md. 577 (1884),— *aliter*, where the plaintiff was held to bail to keep the peace after a hearing, *Hill v. Egan*, 160 Pa. St. 119 (1894),— *Steward v. Gromett*, 7 C. B. (N. S.) 191 (1859),— an attachment issued upon the defendant's oath that the plaintiff had left the country with intent to defraud his creditors; *Bump v. Betts*, 19 Wend. 421 (N. Y. 1838). So in *McSwain v. Edge*, 6 Ga. App. 9 (1909), it was held that an action would lie by a tenant evicted under a summary warrant obtained *ex parte* by the defendant, his landlord, there being no way after eviction for arresting the process or for forming an issue thereon. But the mere fact that there is no right of appeal from a conviction by a justice after hearing does not warrant an indirect review of the conviction in an action of malicious prosecution, *Basebé v. Matthews*, L. R. 2 C. P. 684 (1867).

⁵ He also says, "If this should be allowed, the defendant would be deceived by the consent, as without that he would certainly have gone on with the action, and might have shown a foundation for it."

ceeding in violation of his agreement went before the magistrate and procured the dismissal of the charge for want of prosecution. It was held that this was not sufficient, the court saying: "But a *nolle prosequi* by consent, or by way of compromise, or where such exemption from further prosecution has been demanded as a right, or sought for as a favor, is not enough. * * * The principle of the cases is that the discharge or acquittal must be by judicial action under such circumstances as that the party accused has not avoided or prevented judicial investigation."

And it has been held in many different jurisdictions under varying circumstances that the entry of a *nolle prosequi* by the prosecuting officer or the termination of a criminal proceeding by the procurement of the party prosecuted or by his consent or by way of compromise is not such a termination of a prosecution as will enable the party thereby discharged to maintain an action for malicious prosecution. (*Langford v. B. & A. R. R. Co.*, 144 Mass. 431; *Russell v. Morgan*, 24 R. I. 134; *Craig v. Ginn*, 94 Am. State Repts. 77; *Welch v. Cheek*, 115 N. C. 310; *Marcus v. Bernstein*, 117 N. C. 31; *Holliday v. Holliday*, 123 Cal. 26; *Rosenberg v. Hart*, 33 Ill. App. 262; *Marbourg v. Smith*, 11 Kans. 554).⁶

From all of these authorities added to others which are more familiar I think two rules fairly may be deduced. The first one is that where a criminal proceeding has been terminated in favor of the accused by judicial action of the proper court or official in any way involving the merits or propriety of the proceeding or by a dismissal or discontinuance based on some act chargeable to the complainant as his consent or his withdrawal or abandonment of his prosecution, a foundation in this respect has been laid for an action of malicious prosecution.⁷ The other and reverse rule is that

⁶ *Accord: Emery v. Ginnan*, 24 Ill. App. 65 (1887); *Wickstrom v. Swanson*, 107 Minn. 482 (1909); *Baxter v. Gordon, Ironsides and Fares*, 13 Ont. L. R. 598 (1906); but see *Craig v. Hasell*, 4 A. & E. (N. S.) 481 (1843). So where one charged with embezzlement is discharged on payment of the money which he was charged with taking, *Fadner v. Filer*, 27 Ill. App. 506 (1888); but see *White v. Int. Book Co.* and *Darley v. Donath*, *infra*, Note 8.

A discontinuance or abandonment of a civil suit upon a compromise or payment of the amount claimed is not a termination of it, *Sartwell v. Parker*, 141 Mass. 405 (1886); *Rounds v. Humes*, 7 R. I. 535 (1863); *Forster v. Orr*, 17 Ore. 447 (1889).

But the accused, though present in person or by attorney, need not object to the proceedings being dropped, *Lamprey v. Hood*, 73 N. H. 384 (1905), he or his counsel may even protest against his being held any longer on the charge and so lead the state's attorney to enter a *nolle prosequi*, *Driggs v. Burton*, *supra*. Where the magistrate refuses to consider an agreement to settle a felony, but hears the case and discharges the accused, an action for malicious prosecution was held to lie, *Van Voorhes v. Leonard*, 1 Thomps. & C. 148 (N. Y. 1873).

⁷ It is not necessary that the termination shall be such as to preclude another prosecution for the same offense, it is enough that it is a final determination of the present proceeding, "so that it can not be revived but the prosecutor if he wishes to proceed further, must institute proceedings *de novo*." *Graves v. Scott*, 104 Va. 372 (1905); *Vinal v. Core*, 18 W. Va. 1 (1881); *Leyenberger v. Paul*, 40 Ill. App. 516 (1890).

But if the prosecutor, notwithstanding that a warrant is dismissed by a magistrate, proceeds with the prosecution as by procuring an indictment to

where the proceeding has been terminated without regard to its merits or propriety by agreement or settlement of the parties or solely by the procurement of the accused as a matter of favor or as the result of some act, trick or device preventing action and consideration by the court, there is no such termination as may be

be presented to the grand jury, which prosecution is still pending or has terminated in the conviction of the accused, such subsequent prosecution is held in *Hartshorn v. Smith*, 104 Ga. 235 (1898), to be in effect a continuation of the original prosecution; accord: *Schippel v. Norton*, 38 Kans. 567 (1888), prosecution before a justice of the peace withdrawn by district attorney and the same day a new prosecution begun in the district court; *Hales v. Raines*, 162 Mo. App. 46 (1911), involuntary non-suit suffered in a civil case and a second action thereafter begun for same cause, and see *Rogers v. Mullins*, 26 Tex. Civ. App. 250 (1901).

The earlier English cases required that there should be an acquittal by a jury after a trial on the merits, *Pantsune v. Marshall*, Sayer 162 (1754), *Morgan v. Hughes*, 2 T. R. 225 (1788), or at least a determination in favor of the accused upon the merits, *Goddard v. Smith*, 6 Mod. 261 (1704), 1 Salk 21, 2 Salk 456, 3 Salk 245, as to the present state of the English law see Clerk and Lindsell on Torts, 6th ed. 700-702 (1912), citing *Delegal v. Highley*, 3 Bing. N. C. 950 (1837), and *Craig v. Hasell*, 4 A. & E. (N. S.) 481 (1843). Dicta to the same effect occur in many early American cases, *Monroe v. Maples*, 1 Root 553 (Conn. 1793); *Williams v. Woodhouse*, 3 Dev. Law 257 (N. Car. 1831); *Hibbing v. Hyde*, 50 Cal. 206 (1875); *Scott and Boyd v. Shelor*, 28 Grat. 891 (Va. 1877), and cases cited in the note to *Graves v. Scott* in 2 L. R. A. (N. S.) 927, pp. 930-932.

But the later American cases do not, as a rule, require an acquittal after a trial on the merits. Where the accused is discharged by the court having jurisdiction, whether a trial or appellate court or a committing magistrate or a justice of the peace, this is generally held a sufficient termination of the case, though it is sometimes held that the plaintiff must show that the prosecution has been thereafter abandoned, *Page v. Citizen's Banking Co.*, 111 Ga. 73 (1900); *Dreyfus v. Aul*, 29 Nebr. 191 (1890); *Waldron v. Sperry*, 53 W. Va. 116 (1903); and see *Hartshorn v. Smith* and *Schippel v. Morton*, *supra*.

The charge may be dismissed and the accused discharged by the court itself, *Delegal v. Highley*, *supra*; *Findley v. Buchanan*, 1 Blackf. 12 (Ind. 1818); *Sayles v. Briggs*, 4 Metc. 421 (Mass. 1842); *Rider v. Kite*, 61 N. J. L. 8 (1897); *Secor v. Babcock*, 2 Johns. 203 (N. Y. 1807); *Mentel v. Hippely*, 165 Pa. St. 558 (1895), and see *Zebley v. Storey*, 117 Pa. St. 478 (1888), *semble*; *Graves v. Scott*, 104 Va. 372 (1905), and cases cited in the note thereto in 2 L. R. A. (N. S.) 927, at pp. 933-935, either after a hearing on the merits, *Cascarella v. National Grocer Co.*, 151 Mich. 15 (1908), or without a hearing; *Smith v. Clark*, 37 Utah 116 (1910); *McDonald v. National Art Co.*, 125 N. Y. S. 708 (1910); but see *Whaley v. Lawton*, 57 S. Car. 256 (1899), though no action lies where the magistrate, after holding the accused to bail, illegally discharged him without bail, *Hill v. Egan*, 160 Pa. St. 119 (1894).

The accused may be discharged by order of a court after a grand jury had ignored the bill of indictment, *Graves v. Dawson*, 130 Mass. 78 (1881); *Stewart v. Thompson*, 51 Pa. St. 158 (1865); *Taylor v. Dominick*, 36 S. Car. 368 (1891); *Kneeland v. Spitzka*, 10 Jones & Spencer 470 (N. Y. 1877); *Hower v. Lewton*, 18 Fla. 328 (1881), *aliter*, in some jurisdictions where though the grand jury has ignored the bill, there has been no discharge by order of the court, Buller, J. in *Morgan v. Hughes*, 2 T. R. 225 (1788); *Thomas v. De Graffenreid*, 2 Nott & McC. 143 (S. Car. 1819); *Knott v. Sargent*, 125 Mass. 95 (1878); *contra*, *Potter v. Casterline*, 41 N. J. L. 22 (1879), and *Weisner v. Hansen*, 81 N. J. L. 601 (1911); *Wells v. Parker*, 76 Ark. 41 (1905); *Schoonover v. Myers*, 28 Ill. 308 (1862); *Horn v. Sims*, 92 Ga. 421 (1893); *Auer v. Mauser*, 6 Pa. S. C. 618 (1898), but mere failure to find a true bill

availed of for the purpose of such an action. The underlying distinction which leads to these different rules is apparent. In one case the termination of the proceeding is of such a character as establishes or fairly implies lack of a reasonable ground for his prosecution. In the other case no such implication reasonably follows. (Townsend on Slander, section 423.)

When we apply these rules to the defenses which have been

at the first term of the court is not enough, *Von Koehring v. Witte*, 15 Tex. Civ. App. 646 (1897).

Or he may be discharged after an indictment has been quashed, *Hays v. Blizzard*, 30 Ind. 457 (1868), though on motion of counsel for the accused, *Lytton v. Baird*, 95 Ind. 349 (1883); *McKensie v. M. P. R. Co.*, 24 Mo. App. 392 (1887), or on the refusal of the prosecution to give security for costs, *Casebeer v. Rice*, 18 Nebr. 203 (1885).

The accused may be discharged because the prosecutor abandons the prosecution and withdraws the complaint, *Brown v. Randall*, 36 Conn. 56 (1869); *Clegg v. Waterbury*, 88 Ind. 21 (1882); *Beemer v. Beemer*, 9 Ont. L. R. 69 (1904); *Shaul v. Brown*, 28 Iowa 37 (1869); *Bell v. Mathews*, 37 Kans. 686 (1887), or because the State Attorney fails to appear or to proceed with the prosecution, *Swensgaard v. Davis*, 33 Minn. 368 (1885), especially when no further steps are taken to press the charge, *Fay v. O'Neill*, 36 N. Y. 11 (1867); *Waldron v. Sperry*, 53 W. Va. 116 (1903), or requests the court to dismiss the charge, *South. Car & Foundry Co. v. Adams*, 131 Ala. 147 (1901); *Welch v. Cheek*, 115 N. Car. 310 (1894).

An abandonment of or a failure to proceed with the prosecution is held in many cases to be sufficient though no action is taken by the court either in discharging the accused or releasing his securities or giving leave to the prosecutor to abandon the prosecution, *Craig v. Ginn*, 3 Penn. 117 (Del. 1901); *Green v. Cochran*, 43 Iowa 544 (1876); *Leever v. Hamill*, 57 Ind. 423 (1877); *Pharis v. Lambert*, 1 Sneed 228 (Tenn. 1853); *contra*, *Clark v. Cleveland*, 6 Hill 344 (N. Y. 1844); *Apgar v. Woolston*, 43 N. J. L. 57 (1881); *Holmes v. Johnson*, Busbee 44 (N. Car. 1852); *Rice v. Ponder*, 7 Ire. L. 390 (N. Car. 1847); *Murray v. Lackey*, 2 Murphy 368 (N. Car. 1818); *Lueck v. Heisler*, 87 Wis. 644 (1894), and *Gillespie v. Hudson*, 11 Kans. 163 (1893); *Strehlow v. Pettit*, 96 Wis. 22 (1897), but see *King v. Johnston*, 81 Wis. 578 (1892); *Walker v. Curran*, 1 Phila. 113 (Pa. 1850), but compare *Murphy v. Moore*, *supra*.

Some of the earlier cases state in general terms that a plaintiff cannot maintain an action for a malicious criminal prosecution by indictment, by showing that the prosecution has been determined by a *nolle prosequi*, *Shaw, C. J.* in *Parker v. Farley*, 10 Cush. 279 (Mass. 1852); *Goddard v. Smith*, *supra*; though a plea of not guilty accepted by the Attorney-General was in the latter case said to be sufficient; the tendency of the later cases is, however, to hold that, when the accused was thereupon discharged, there is a sufficient termination, *Graves v. Dawson*, 133 Mass. 419 (1882), *semble*; *Stanton v. Hart*, 27 Mich. 539 (1873); *Douglas v. Allen*, 56 Ohio St. 156 (1897); *Driggs v. Burton*, 44 Vt. 124 (1871), a discharge by the court but not by formal order; *Hatch v. Cohen*, 84 N. Car. 602 (1881), and this though the court grants leave to issue, at some later time, a *capias* on the same bill, if in fact the prosecution is never renewed, *Wilkinson v. Wilkinson*, 159 N. Car. 265 (1912).

The withdrawal of the charge by the State Attorney is held a sufficient termination in *Fancourt v. Heaven*, 18 Ont. L. R. 492 (1909).

When the prosecuting attorney merely enters a *nolle prosequi* without further action by the court, this is held sufficient in *Murphy v. Moore*, 11 Atl. 665 (Pa. Sup. Ct. 1887); *Thompson v. Price*, 100 Mich. 558 (1894); *Yocum v. Polly*, 1 B. Monr. 358 (Ky. 1841); *Woodman v. Prescott*, 66 N. H. 375 (1890); *Marcus v. Bernstein*, 117 N. Car. 31 (1895); *Woodworth v. Mills*, 61 Wis. 44 (1884), *nolle prosequi* entered with leave of the court; *Moulton v. Beecher*, 8 Hun 100 (N. Y. 1876); *accord*: *Graves v. Scott*, 104

pleaded it is evident that they sufficiently allege a termination of the Mexican Proceeding which is not of a character to sustain this action, and ought not to be. That proceeding came to a dismissal and end, not because of any judicial action in favor of the accused

Va. 372 (1905), *semble*, expressly overruling *Ward v. Reasor*, 98 Va. 399 (1900), *contra*.

Contra: *Craig v. Ginn*, 3 Penn. 117 (Del. 1901); *Parker v. Farley*, *supra*, *semble*; *Coupal v. Ward*, 106 Mass. 289 (1871); *Garing v. Fraser*, 76 Maine 37 (1884); *Driggs v. Burton*, *supra*, *semble*; *Heyward v. Cuthbert*, 4 McCord 354 (S. Car. 1827); *Smith v. Shackelford*, 1 Nott & McC. 36 (S. Car. 1817); and see *Hurd v. Shaw*, 20 Ill. 355 (1858).

A discharge on *habeas corpus*, the prosecution being then abandoned, is held in *Zebley v. Storey*, 117 Pa. St. 478 (1888); *Holliday v. Holliday*, 123 Cal. 26 (1898); *Millar v. Sollitt*, 131 Ill. App. 196 (1907); see *Walker v. Martin*, 43 Ill. 508 (1867), to be a sufficient termination; *contra*, *McKinnon v. McLaughlin Carriage Co.*, 37 New Brunswick, 3 (1904); *Merriman v. Morgan*, 7 Ore. 68 (1879); *Haglin v. Able*, 65 Ark. 274 (1898); *Swartwout v. Dickelman*, 12 Hun 358 (N. Y. 1877); *Hinds v. Parker*, 11 App. Div. 327 (N. Y. 1896).

In those jurisdictions in which an action lies for malicious prosecution of a civil action, such action must be shown to have so terminated that it cannot be revived, though a new action may be brought on the same cause of action, *Hurgren v. Union Mutual Life Ins. Co.*, 141 Cal. 585 (1904); *McNamee v. Minke*, 49 Md. 122 (1878); *Blalock v. Randall*, 76 Ill. 224 (1875). The action being entirely in the control of the plaintiff therein, his dismissal, discontinuance, or failure to proceed with it for such time as precludes further prosecution of it is universally held to be a sufficient termination, *Pierce v. Street*, 3 B. & Ad. 397 (1832); *Emery v. Ginnan*, 24 Ill. App. 65 (1887); *Coffey v. Myers*, 84 Ind. 105 (1882); *Burhans v. Sanford*, 19 Wend. 417 (N. Y. 1838); *Hurgren v. Ins. Co.*, *supra*; *Norrish v. Richards*, 3 A. & E. 733 (1835); *Cameron v. Fergusson*, 3 U. C. Q. B. (O. S.) 318 (1834).

An action may be brought after judgment though the time for moving for a new trial or for an appeal has not elapsed, *Foster v. Denison*, 19 R. I. 351 (1896); *Marks v. Townsend*, 97 N. Y. 590 (1885), and see *Carter v. Paige*, 80 Cal. 390 (1889). But an action cannot be maintained if an appeal is actually pending, *Griffith v. Ward*, 22 U. C. Q. B. 31 (1863); *Howell v. Edwards*, 8 Ired. L. 516 (N. Car. 1848); *Sutton v. Van Akin*, 51 Mich. 463 (1883); *Spring v. Besore*, 12 B. Monr. 551 (Ky. 1851); *Reynolds v. De Geer*, 13 Ill. App. 113 (1883), appeal from judgment of a justice, which vacated the judgment and removed the case to the district court for trial *de novo*; *contra*, *Marks v. Townsend*, *supra*, an appeal only furnishes a reason for staying the trial of the action for malicious prosecution till the appeal be determined, *Luby v. Bennett*, 111 Wis. 613 (1901), *semble*.

When the plaintiff is arrested or his property seized or attached in a civil action, if the arrest, seizure or attachment is wrongful only in that the principal action is improperly brought, it must be shown that such action is terminated, *Parton v. Hill*, 12 W. R. 754 (1864); *Johnson v. Finch*, 93 N. Car. 205 (1885), plaintiff, actually about to leave the state, arrested for debt, and see *Murson v. Austin*, 2 Phila. 116 (Pa. 1856).

When the process is awarded for arrest of the plaintiff, or attachment or seizure of his goods, upon an application setting forth the facts, not involving the merits of the principal action, it is enough that the order of process be vacated, dismissed or abandoned, *Ingram v. Root*, 51 Hun 238 (N. Y. 1889); *Zinn v. Rice*, 154 Mass. 1 (1891), p. 12; *Bank of Miller v. Richmon*, 64 Nebr. 111 (1902); *Hogg v. Pinckney*, 16 S. Car. 387 (1881); *Tisdale v. Kingman*, 34 S. Car. 326 (1890); *Pixley v. Reed*, 26 Minn. 80 (1879), though if it be granted on *ex parte* application the plaintiff having no opportunity to defend or vacate, *Griffith v. Hall*, 26 U. C. Q. B. 94 (1866); *Erickson v. Brand*, 14 Ont. App. R. 614 (1888); *Fortman v. Rottier*, 8 Ohio St. 548 (1858); *Donnell v. Jones*, 13 Ala. 490 (1848), and see *Rossiter v.*

for lack of merits or because of a withdrawal or abandonment of it by the prosecuting party, but simply because the defendant therein succeeded in escaping from the country and eluding the jurisdiction of the court and thereby preventing a prosecution. He by his flight, as in other cases the accused had done by agreement, settlement or trick, prevented a consideration of the merits, and he ought not now to be allowed to claim that there were no merits.⁸

In opposition to these views it is insisted by appellant that there is a line of cases which treats the discharge of the defendant in the criminal proceeding as a mere technical condition precedent to the action for malicious prosecution and sustain his theory that the dismissal of the proceeding against him was sufficient for the purposes of this action, specific reference being made to the cases of *Clark v. Cleveland* (6 Hill, 344); *Moulton v. Beecher* (8 Hun, 100); *Fay v. O'Neill* (36 N. Y. 11); *Coffey v. Myers* (84 Ind. 105), and *Robbins v. Robbins* (133 N. Y. 597).⁹ * * *

It is, however, the Robbins case upon which the appellant most relies. In that case it appeared that the accused had been discharged in the criminal proceeding after a hearing by a police justice and the only question was whether she was discharged because there was not sufficient evidence against her or whether she was erroneously discharged as a matter of sympathy upon her promise of good behavior. This question was one of fact for the jury, which presumably resolved it in favor of the plaintiff. But even if the justice under the circumstances was actuated by erroneous or improper motives in discharging her, it nevertheless beyond any question was a sufficient termination of the proceeding under all of the authorities bearing on that subject, and on either theory the

Minn., etc. Co., 37 Minn. 296 (1887), or if to procure the release of himself or his goods he is forced to pay the demand or give bond for payment, the execution of the process is itself a sufficient termination, *Spaids v. Barrett*, 57 Ill. 289 (1870); *Brand v. Hinchman*, 68 Mich. 590 (1888), see *Cadwell v. Corey*, 91 Mich. 335 (1892), and compare *Rachelman v. Skinner*, 46 Minn. 196 (1891).

⁸ When, however, the plaintiff alleged that the criminal charge was false and that he had fled the jurisdiction because a conspiracy existed to prevent him from establishing his innocence and that the proceedings were dismissed because the originators thereof "became convinced that they could not maintain the prosecution," an action for malicious prosecution was held to lie in *Coffey v. Myers*, 84 Ind. 105 (1882). The payment of costs by the accused on being discharged by the magistrate after a hearing on the merits, he being told that unless he did so he would have to go back to jail, does not constitute a consent on his part to the termination of the proceedings, *Cascarella v. National Grocer Co.*, 151 Mich. 15 (1908), and an action of malicious prosecution lies by one, who being arrested on a writ, pays the amount claimed under protest to obtain his liberty, and such payment does not preclude him from showing want of probable cause, *Morton v. Young*, 55 Maine 24 (1867); *White v. International Text Book Co.*, 136 N. W. 121 (Iowa 1912); and see *Brand v. Hinchman*, 68 Mich. 590 (1888), payment no bar to action for suing out malicious attachment, and *Daily v. Donath*, 100 Ill. App. 52 (1901), where the criminal process was abused by its use as a means of enforcing payment of a debt claimed to be due.

⁹ A portion of the opinion, reviewing *Clark v. Cleveland*, *Moulton v. Beecher*, *Fay v. O'Neill* and *Coffey v. Myers*, is omitted.

basis was laid for an action of malicious prosecution. Under these circumstances the learned judge who wrote the opinion made use of some expressions which interpreted by themselves are quite broad and general and are quite confidently quoted by this appellant. He said, among other things: "It can not in reason make any difference how the criminal prosecution is terminated, provided it is terminated. * * * The circumstances under which she (the plaintiff in that case) is discharged may furnish competent evidence upon the issue of probable cause and malice, and on the question of damages. * * * The termination of the criminal proceeding is a mere technical matter in no way concerning the merits of the action and is a mere condition precedent to its maintenance." (P. 600.)

In my opinion these remarks should not be construed as meaning and were not intended to mean what the appellant claims. For instance, it is not possible that it was intended to disregard the entire current of authority that a termination of criminal proceedings by agreement or settlement is not such an one as will support an action for malicious prosecution, and yet literally the language employed would include that case. We must construe the language used by Judge Earl in the light of the events he was considering, and these were the discharge of an accused by a magistrate acting judicially even though erroneously after a hearing. This was what the judge had in mind when, after discussing the effect of a conviction, he mentioned the other termination resulting "favorably to the accused or without his conviction," as sufficient. And when he said "It can not in reason make any difference how the criminal prosecution is terminated provided it is terminated," he immediately referred as illustrating his meaning to the case then in hand, where the accused had been duly discharged by the justice although as claimed erroneously. Termination as the result of judicial consideration and decision was what he was talking about and this was the kind he contemplated when with his concluding words he said: "Therefore any termination such as we have above mentioned, as a general rule, furnishes the condition precedent." (P. 600.)

Therefore, I think that these cases do not either singly or collectively sustain the burden which appellant has sought to impose especially upon them of furnishing an authority for the reversal of the order appealed from, and for all the reasons stated the latter should be affirmed, with costs, and the questions certified to us answered in the negative.

VANN, J. I concur in the result because there was merely an attempt to prosecute with no actual prosecution. The Mexican court did not acquire jurisdiction of the person of the plaintiff, for he was not arrested, nor was process or notice of any kind served upon him. He was not brought into court and the prosecution could not end because it was never begun. He could not be a party defendant until he was notified or voluntarily appeared. He was threatened with prosecution, but neither his person nor his prop-

erty was touched. There can be no prosecution unless knowledge thereof is brought home to the alleged defendant in some way. If there had been a prosecution commenced the crime could not have outlawed during the defendant's absence, as is admitted of record. While in civil actions, in order to arrest the Statute of Limitations, "an attempt to commence an action, in a court of record, is equivalent to the commencement thereof," still the attempt goes for naught unless followed by service, actual or constructive, within sixty days. (Code Civ. Proc., sec. 399.) The rule was similar at common law. Although, in order to prevent injustice, an action was deemed to be commenced by the delivery of process for service, it was never treated as effectual for any purpose unless actual service was subsequently made. The authorities cited in the prevailing opinion illustrate this proposition.

In the absence of controlling authority, which it is conceded does not exist, I favor restricting rather than enlarging the scope of the action. This accords with the general position of the court upon the subject.

GRAY, HAIGHT and CHASE, JJ., concur with HISCOCK, J.; CULLEN, CH. J., and WILLARD BARTLETT, J., concur with VANN, J.
Order affirmed.

(2) Nature of the proceedings.

QUARTZ HILL GOLD MINING COMPANY v. EYRE.

Court of Appeal, 1883. Law Reports 1882-83, 11 Q. B. D. 674.

BOWEN, L. J. The plaintiff company complains that the defendant falsely and maliciously presented a petition to wind it up.¹ When the action came on to be tried before Stephen, J., at the conclusion of the plaintiff's case the learned judge nonsuited the company, on the ground that if the action would lie under any circumstances, at all events it would not lie without proof of special damage. Without actually deciding the point, he expressed an opinion that the plaintiff company had failed to make out malice or a want of reasonable or probable cause, and the burden of proving each of these elements in the case lay on the company. He thought that the defendant had pointed out a fatal blot in the company's case by reason of a failure to shew such special damage as would maintain the action.

The first question to be considered is, whether an action will lie for falsely and maliciously presenting a petition to wind up a company; and the second is, whether an action will lie without fur-

¹ It was averred in the complaint and proved at the trial that the defendants had upon the presentation of the petition advertised the same in the London Gazette and other papers, and that two days before the present action was brought, the petition was dismissed by the court and wholly determined in the plaintiff's favor.

ther proof of special damage than was presented to the judge in this case. I think that both the questions can be answered at once because, as it seems to me, the discussion which exhausts the one, presents the materials for determining the other. I start with this, that at the present day the bringing of an action under our present rules of procedure, and with the consequences attaching under our present law, although the action is brought falsely and maliciously and without reasonable or probable cause, and whatever may be the allegations contained in the pleadings, will not furnish a ground for a subsequent complaint by the person who has been sued, nor support an action on his part for maliciously bringing the first action. To speak broadly, and without travelling into every corner of the law, whenever a man complains before a court of justice of the false and malicious legal proceedings of another, his complaint, in order to give a good and substantial cause of action, must shew that the false and malicious legal proceedings have been accompanied by damage express or implied. The reason why, to my mind, the bringing of an action under our present rules of procedure and under our present law, even if it is brought without reasonable or probable cause and with malice, gives rise to no ground of complaint, appears to me easily to be seen upon referring to the doctrine laid down by Holt, C. J., in *Savile v. Roberts*, 1 Ld. Raym. 374, at p. 378. He there said that there were three sorts of damage, any one of which would be sufficient to support an action for malicious prosecution. "(1) The damage to a man's fame, as if the matter whereof he is accused be scandalous. And this was the ground of the case between Sir Andrew Henley and Dr. Burstall: Raym. 180. * * * (2) The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty, which has been always allowed a good foundation of such an action.* * * (3) The third sort of damages, which will support an action, is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses, is without doubt, which is an injury to his property, and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself." It is clear that Holt, C. J., considered one of those three heads of damage necessary to support an action for malicious prosecution. To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action, although it is brought mali-

*See *Byne v. Moore*, 5 Taunt. 187, 1 Marsh 12 (1813), where a bill of indictment was preferred for assault and battery but ignored by the grand jury and the accused was not arrested—held no action lay, the indictment not containing "scandal"—(as to this see Clerk and Lindsell on Torts, 6th ed., 693) and *Mitchell v. Donanski*, 28 R. I. 94 (1906), warrant obtained, never served but abandoned, charging acts not constituting any crime, held not actionable unless the offence charged is actionable slander *per se* or the plaintiff can show special damage.

ciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, in all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury; but the bringing of the action is of itself no injury to him. When the action is tried in public, his fair fame will be cleared, if it deserves to be cleared; if the action is not tried, his fair fame can not be assailed in any way by the bringing of the action. Apply the second head of damage, namely, those injuries which are done to the person; the bringing of no action under our present law and under the ordinary rules of procedure will involve as a necessary and natural consequence damage to the person. The third sort of damage, the existence of which will support such an action as this, is damage to a man's property. The same observation applies to this third head of damage. The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the law recognizes, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him.³ If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action; if he does not deserve them, he ought not to get them in a subsequent action. Therefore the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.⁴ I do not say that if one travels into

³ "The common law has made provision to hinder malicious and frivolous and vexatious suits, that every plaintiff should find pledges, who were amerced, if the claim was false; which judgment the court always gave, and then a writ issued to the coroners, and they affeered them according to the proportion of the vexation. See 8 Co. 39 b, F. N. B. 76 a" (Fitzherbert *de Natura Brevium*). "But that method became disused and then to supply it, the statutes" (4 Jac. 1 c 3 and 8 Eliz. c 2) "gave costs to the defendant. And though the practice of levying amercements be disused, yet the Courts must give judgment according to the law and not vary their judgments by accidents. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action"—Holt, C. J., in *Saville v. Roberts*, 1 Ld. Raym. 374 (1700), p. 380; and see Putnam, J., in *Lindsay v. Larned*, 17 Mass. 190 (1821).

⁴ Accord: *Tamblyn v. Johnston*, 126 Fed. 267 (C. C. A. 8th Circ. 1903) *semble*; *Mitchell v. Southwestern R. Co.*, 75 Ga. 378 (1898); *Smith v. Michigan Buggy Co.*, 175 Ill. 619 (1898); *Weimore v. Mellinger*, 64 Iowa 741 (1884); *Cade v. Yocum*, 8 La. Ann. 477 (1852); *McNamee v. Minke*, 49 Md. 122 (1878); *Supreme Lodge, etc., v. Unversagt*, 76 Md. 104 (1894); *Woodmansie v. Logan*, 2 N. J. L. (1 Penn.) 93 (1806); *Potts v. Imlay*, 4 N. J. L. (1 South.) 330 (1816); *Bits v. Myer*, 40 N. J. L. 252 (1878); *Paul v. Fargo*, 84 App. Div. 9 (N. Y. 1903), Adams, P. J., dissenting on the ground that the injury to his reputation caused by the charge, practically amount-

the past and looks through the cases cited to us, one will not find scattered observations and even scattered cases which seem to shew that in other days, under other systems of procedure and law, in which the consequences of actions were different from those of the present day, it was supposed that there might be some kind of action which, if it were brought maliciously and unreasonably, might subsequently give rise to an action for malicious prosecution. It is unnecessary to say that there could not be an action of that kind in the past, and it is unnecessary to say that there may not be such an action in the future, although it can not be found at the present day. The counsel for the plaintiff company have argued this case with great ability; but they can not point to a single instance since Westminster Hall began to be the seat of justice in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause. And although every judge of the present day will be swift to do justice and slow to allow himself as to matters of justice to be encumbered with either precedents or technicalities, still every wise judge who sits to administer justice must feel the greatest respect for the wisdom of the past presents us with no decisive authority for the broad proposition in its entirety which the counsel for the plaintiff company have put forward.

But although an action does not give rise to an action for malicious prosecution, inasmuch as it does not necessarily or naturally involve damage, there are legal proceedings which do necessarily and naturally involve that damage; and when proceedings of that kind have been taken falsely and maliciously, and without reasonable or probable cause, then, inasmuch as an injury has been done, the law gives a remedy. Such proceedings are indictments—I do not say every indictment, but I mean all indictments involving either scandal to reputation or the possible loss of liberty to the person, that

ing to one of larceny, upon which the original action was based, constituted a special or added grievance; *Willard v. Holmes, Booth & Hayden*, 142 N. Y. 492 (1894), *semble*; *Terry v. Davis*, 114 N. Car. 31 (1894); *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489 (1899), *Kramer v. Stock*, 10 Watts 115 (Pa. 1840); *Muldoon v. Rickey*, 103 Pa. St. 110 (1883); *Mitchell v. Donanski*, 28 R. I. 94 (1906); *Johnson v. King*, 64 Tex. 226 (1885); *Abbott v. Thorne*, 34 Wash. 692 (1904); *Luby v. Bennett*, 111 Wis. 61 (1901), *semble*.

In *Mitchell v. Southwestern R. Co.*, *Terry v. Davis*, and *Abbott v. Thorne*, 34 Wash. 692 (1904), it is said that such an action lies when special damage, other than that which necessarily result from all prosecutions of like causes, is shown; in *Willard v. Holmes et al.*, 142 N. Y. 492 (1894), that it lies where the party "has been subjected to some special or added grievance," but the residue of the sentence seems to confine actionable special grievances to interferences with persons or property, and even such actions, it is said, ought not to be encouraged, and in *Wetmore v. Mellinger*, 64 Iowa 741 (1884), it is said that if the action be so prosecuted as to entail unusual hardship upon the defendant, he ought to be compensated, see *Pangburn v. Bull*, 1 Wend. 345 (N. Y. 1828), defendant brought action after action, discontinuing the one and starting another, and *Pope v. Pollock*, 46 Ohio St. 367 (1889), advantage taken of the peculiar incidents of a statutory action in order to harass the plaintiff and subject him to special loss of property and reputation.

is, all ordinary indictments for ordinary offences. In its very nature the presentation or the prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings, to the fair fame of the person assailed, and for that reason, as it seems to me, the law considers that to present and prosecute an indictment falsely and without reasonable or probable cause, is a foundation for a subsequent action for malicious prosecution.

But there are other proceedings which necessarily involve damage, such as the presentation of a bankruptcy petition against a trader. In the past, when a trader's property was touched by making him a bankrupt in the first instance, and he was left to get rid of the misfortune as best he could, of course he suffered a direct injury to his property. But a trader's credit seems to me to be as valuable as his property, and the present proceedings in bankruptcy, although they are dissimilar to proceedings in bankruptcy under former Acts, resemble them in this, that they strike home at a man's credit, and therefore I think the view of those judges correct who held, in *Johnson v. Emerson*, Law Rep. 6 Ex. 329, that the false and malicious presentation, without reasonable and probable cause, of a bankruptcy petition against a trader, under the Bankruptcy Act, 1869, gave rise to an action for malicious prosecution.⁵

⁵ *Accord: Chapman v. Pickersgill*, 2 Wils. 145 (1762); *Stewart v. Sonneborn*, 98 U. S. 187 (1878); *Wilkinson v. Goodfellow*, 141 Fed. 218 (1905); *Lawton v. Green*, 5 Hun 157 (N. Y. 1875); *King v. Sullivan*, 92 S. W. 51 (Texas Civ. App. 1906); *McNamee v. Minke*, 49 Md. 122 (1878), *semble*; *Hess v. German Baking Co.*, 37 Ore. 297 (1900), *semble*.

So an action lies against one who has maliciously obtained a temporary injunction. Such an injunction, it is said in *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489 (1899), "imposes a restraint upon the owner over his property, as hurtful to him as if it were in fact seized;" *Mitchell v. Southwestern R. Co.*, 75 Ga. 398 (1885); *Crate v. Kohlsaat*, 44 Ill. App. 460 (1892); *Beach v. Williams*, 79 N. W. 393 (Iowa 1899); *Burt v. Smith*, 84 App. Div. 47 (N. Y. 1903), compare *Clements v. Odorless Excavating Apparatus Co.*, 67 Md. 461 (1887); *Newark Coal Co. v. Upson*, 40 Ohio St. 17 (1883); *Hess v. German Baking Co.*, 37 Ore. 297 (1900), *semble*, in which the plaintiff failed, because owing to the death of the defendant he was forced to strike out of his declaration the averments of malice and want of probable cause; *Williams v. Ainsworth*, 121 Wis. 600 (1904); but the injunction must have been dissolved and the main suit finally determined in the plaintiff's favor before an action will lie, *Munce v. Black*, 7 Ir. C. L. R. 475 (1858), dispossessory injunction obtained in a dispute between landlord and tenant; *Williams v. Ainsworth*, 121 Wis. 600 (1904), in which it was also held that the plaintiff must show that he was damaged by such injunction, and that no action lay for maliciously restraining the sale of goods in the absence of proof that they brought less when sold than they would have done had their sale not been restrained.

So in *Slater v. Kimbro*, 91 Ga. 217 (1892), it was held that a tenant, a boarding-house keeper, against whom her landlord maliciously and without probable cause sued out and had executed a summary statutory process to dispossess her, could recover the cost of procuring the bond and sureties required to prevent immediate eviction and damages for loss of boarders caused thereby; and see *Tavener v. Morehead*, 41 W. Va. 116 (1895); *contra: Everly v. Rupp*, 90 Pa. St. 259 (1879), *semble*, writ of estrepment—"this writ is purely preventive, it neither arrests the person, nor

I wish to suggest an analogy, not with the view of laying down any principle of law, but rather because it is a matter which may throw light on what I have been saying, and nothing which has fallen from the Master of the Rolls leads me to suppose that anything which I am about to say is contrary to what he thinks. In my opinion some, though perhaps not a perfect, analogy may be found in the law of libel and slander. The essence of the law as to libel and slander is that the words must be published falsely and maliciously. With regard to written words or libel, the law does not require proof of special damage, but with regards to some kind of slander or words spoken the law is different. I am aware that the point is controverted, and that it has never been exactly settled why this difference exists; but it does exist, and it is remarkable that the cases in which words spoken are actionable, are either those where damage has been actually sustained, or where the damage is of such a kind as to be involved in the slander itself, that is to say, to be the natural and necessary consequence of the words spoken, as, for example, when the slander charges that a man has been guilty of an indictable offence which is criminal and scandalous in its character, and involves the loss of liberty or fair fame. What other slanders are actionable? Those which impute to a man a disease necessarily rendering him unfit for society, and those which touch a man in his trade or profession. Put those two classes together—the class of malicious prosecutions which the law recognizes and the class of slanders which the law recognizes—and although the two may not be based on exactly the same principles, perhaps a student may find material for pursuing the analogy between them.

In the present instance we have to consider whether a petition to wind up a company falls upon the one side of the line or the other—whether, as the Master of the Rolls has said, it is more like an action which does not necessarily involve damage, and therefore will not, however maliciously and wrongfully brought, justify an action for malicious prosecution, or whether it is more like a bankruptcy petition. I do not see how a petition to wind up a company can be presented and advertised in the newspapers without striking a blow at its credit. I suppose that most of the lawyers of the present day have seen a great increase of three kinds of abuses, all of which are indulged in for the purpose of extorting the payment of some debt, which ought to be the subject of some civil redress. There is the abuse of the police courts when their process is used to extort money; there is the abuse of the bankruptcy law; and there is the abuse of the provisions in the Companies Act, 1862, for winding up companies. In all these three forms of abuse the aim is to wreck credit, and I should be sorry to

seizes the goods of the defendant"; and see *Batson v. Paris Mountain Water Co.*, 73 S. Car. 368 (1906), where it is held that the remedy, if any, must be upon the bond required by statute and ordered by the court to be given by the complainant in the injunction proceedings, and *Manlove v. Vick*, 55 Miss. 567 (1878), doubting whether such remedy is exclusive.

think that since they all involve a blow at the credit of those against whom they are instituted, the law did not afterwards place in the hands of the injured and aggrieved persons who have been wrongfully assailed, a means of righting themselves, as far as can be, for the mischief done to them. I therefore answer the two first questions—whether this action will lie, and whether it will lie without further proof of special damage—in the following manner: I think that the action will lie, for the reason that special damage is involved in the very institution of the proceedings (which *ex hypothesi* are unjust and without reasonable or probable cause) for the purpose of winding up a going company.⁶

LORD HOLT, C. J., IN *SAVILE v. ROBERTS*.

1 *Lord Raymond*, 374 (1700), p. 379.

“There is a great difference between suing an action maliciously and the indicting of a man maliciously. When a man sues an action he claims a right to himself or complains of an injury done to him; and if a man fancies he has a right, he may sue an action, 4 Co. 17 (a) makes a difference, that if a man calls A, who is an heir at law to B a bastard, A may have an action against the man; but if the man says A is a bastard, and I am heir to B, no action lies. If then the law will permit a man to make a claim out of a court of justice, *a fortiori* when he proceeds to assert his right in a legal course.”¹

EASTIN v. BANK OF STOCKTON.

Supreme Court of the State of California, 1884. 66 Cal. Rep. 123.

The cause of action set forth in the complaint was in substance, that the plaintiff had executed two promissory notes to Barney & Co., which notes he had paid at the defendant bank; that after the notes had been paid the plaintiff lost them and the bank became possessed of them; that the bank and its co-defendant Hogan, entered into a conspiracy for the purpose of extorting money from him by means of the possession of the notes and the plaintiff's

⁶ *Accord: Luby v. Bennett*, 111 Wis. 613 (1901), application for the dissolution of a partnership and the appointment of a receiver, but the suit in which the application was made must have terminated, *Liquid Carbonic Acid Co. v. Convert*, 82 Ill. App. 39 (1898).

¹ See *Lockenour v. Sides*, 57 Ind. 360 (1877), where it is said that an action for malicious prosecution would lie against one maliciously and without probable cause instituting proceedings to place the plaintiff under guardianship as insane, “they being not entirely like a civil action, in which the plaintiff therein claims some right in herself. * * * The defendants were officious intermeddlers, without any claim of right or interest in the matter”; and see *Smith v. Smith*, 20 Hun 555 (N. Y. 1880), where it was held that an action would lie against one who maliciously and without probable cause filed a notice of “*lis pendens*” against the plaintiff's property to prevent her from selling it, with which compare *Gerard v. Dickinson*, *post*.

supposed inability to produce evidence of their payment; that in pursuance of this conspiracy the defendant maliciously, wilfully and without reasonable or probable cause, and with the intent to vex, harass and injure the credit of the plaintiff, commenced an action in the district court for the recovery of the sum for which the notes were given; that the process in that action was served upon the plaintiff who expended for counsel fees and costs the sum of \$650; and that by reason of the commencement and prosecution of that action the plaintiff was damaged in the amount of \$5,000, by injury to his credit, neglect of his business, etc.; and the action resulted in a judgment for the defendant therein—the plaintiff here.

The answer of the defendants put in issue the material averments of the complaint, and a trial was had with a jury, resulting in a verdict for the plaintiff for the sum of \$3,000; and the judgment was entered against the defendants for that sum and costs.¹

Ross, J. As the case must be sent back for a new trial, it is proper to decide another question raised, and that is, whether in this state an action can be maintained for the malicious prosecution of a civil action, in which no process other than the summons was issued. The weight of the authorities, American as well as English, is against the maintenance of such an action; and so are most of the text-writers. The question has never been determined in this State, and we are, therefore, at liberty to adopt the rule that we think is founded on the better reason. The point was made in the case of *Smith v. George*, 52 Cal. 344, but was not decided, the court holding that it was unnecessary to decide it, but remarking that "the adjudged cases in England and America are conflicting upon the question, and depending to a considerable degree, it would seem, upon the prevailing statutory provisions as to the recovery of costs by the defendant upon the termination of a civil action in his favor." The cases are collected and reviewed by Mr. Lawson, in an instructive article upon the subject, published in the *American Law Register*, and which will be found in the 21st vol., at pages 281-353. The cases are too numerous to be here referred to in detail. The English cases which deny the right to maintain the action, stand upon the ground that the successful defendant is adequately compensated for the damages he sustains by the costs allowed him by the statute.² Those costs, it seems, include the at-

¹The facts are abridged from those stated in the opinion of Ross, J., a part of whose opinion is omitted, holding that the court below erred in leaving the question of probable cause to the jury and in instructing them that, if they found a verdict for the defendant, they should allow him for all he had paid out in defense in the original action, without regard to whether such expenditures were reasonable or not.

²As to the remedy, before the enactment of such statutes, of one against whom an unsuccessful action was brought, see Holt, C. J., in *Savile v. Roberts*, Note 3 to *Quartz Hill Gold Mining Co. v. Eyre*. In *Mitchell v. Southwestern R. Co.*, 75 Ga. 398 (1885), Blandford, J., says, p. 404, "before the statute of 52 Henry III., 1277, it was the practice constantly to hold that, when one sued another maliciously and without probable cause, he was liable to such person for damages in an action of trespass on the case."

torney's charge for preparing the case for trial in all its parts, the fees of the witnesses and the court officials, and even the *honorarium* of the barrister who conducted the case in court. The reason upon which the English rule rests would not, therefore, seem to apply here, where the costs recoverable under the statute are confined to much narrower limits. Under our system the defendant may be subjected, or he may subject himself, to expenses not recoverable, even if the suit terminates in his favor; but of this he has no legal ground to complain when the suit is brought and prosecuted in good faith, because, as said in *Closson v. Staples*, 42 Vt. 209, "it is the ordinary and natural consequences of a uniform and well regulated system, to which all parties in civil actions are required to conform. But when the action is brought and prosecuted maliciously, and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such cases the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff, in such case, has no legal or equitable right to claim that the rule of law which allows a suit to be brought and prosecuted in good faith without liability of the plaintiff to pay the defendant damages, except by way and to the extent of the taxable costs, if judgment be rendered in his favor, should extend to a case where the suit was maliciously prosecuted without probable cause. But where the damages sustained by the defendant in defending a suit maliciously prosecuted without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action on the case.

Two other objections made to the maintenance of the action—first, the claim that if such suits are allowed, litigation will become interminable, because every successful action will be followed by another, alleging malice in the prosecution of the former; and, second, that if the defendant may sue for damages sustained by an unfounded prosecution, the plaintiff may equally bring an action when the defendant makes a groundless defense—are well answered in the article already alluded to: "To the first objection, it is enough to say that the action will never lie for an unsuccessful prosecution, unless begun and carried on *with malice and without probable cause*. With the burden of this difficult proof upon him, the litigant will need a very clear case, before he will be willing to begin a suit of this character. The second argument fails to distinguish between the position of the parties, plaintiff and defendant, in an action at law. The plaintiff sets the law in motion; but if he does so groundlessly and maliciously, he is the cause of the defendant's damage. But the defendant stands only on his legal rights—the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege."^a

^a But see *Hoyt v. Macon*, 2 Colo. 113 (1873), where the defendant maliciously intervened to prevent the plaintiff from pre-empting public land.

Judgment and order reversed, and the cause remanded for a new trial.⁴

(3) Want of probable cause and malice.

BURT v. SMITH.

Court of Appeals of New York, 1905. 181 N. Y. 1.

VANN, J. A malicious prosecution is one that is begun in malice, without probable cause to believe it can succeed, and which finally ends in failure. An action for malicious prosecution is usually based upon an arrest in criminal proceedings, although it may be founded upon a civil action when commenced simply to harass and oppress the defendant. (*Pangburn v. Bull*, 1 Wend. 345; *Vanduzor v. Linderman*, 10 Johns. 106; *Bump v. Betts*, 19 Wend. 421; *Cooley on Torts*, 187; 19 Am. & Eng. Encyc. Law (2d ed.), 652) damages are rarely recovered, however, for the malicious prosecution of a civil action unless person or property is interfered with by some incidental remedy, such as arrest, attachment or injunction. As public policy requires that all persons should freely resort to the courts for redress of wrongs, the law protects them when they act in good faith and upon reasonable grounds in commencing either a civil or criminal prosecution. While malice is the root of the action, malice alone even when extreme, is not enough, for want of probable cause must also be shown. Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of. The want of probable cause does not mean the want of any cause, but the want of any reasonable cause, such as would persuade a man of ordinary care and prudence to believe in the truth of the charge.¹ Probable cause does not necessarily depend

⁴ Accord: *Cooper v. Armour*, 42 Fed. 215 (Cir. Ct. N. Y. 1890), *semble*; *Wade v. National Bank*, 114 Fed. 377 (Cir. Ct. Wash. 1902); *Berson v. Ewing*, 84 Cal. 89; *Whipple v. Fuller*, 11 Conn. 582 (1836), the plaintiff's property was in fact attached, as it was in *Wall v. Toomey*, 52 Conn. 35 (1884); *Whitesell v. Study*, 37 Ind. App. 429 (1906); *Marbourg v. Smith*, 11 Kans. 554 (1873); *Woods v. Finnell*, 13 Bush 628 (Ky. 1878); *Antcliff v. June*, 81 Mich. 477 (1890); *MacPherson v. Runyon*, 41 Minn. 524 (1889); *Smith v. Burrus*, 106 Mo. 94 (1891); *McCormick Harvesting Mach. Co. v. Willan*, 63 Nebr. 391 (1901); *Kolka v. Jones*, 6 N. Dak. 461 (1897); *Lipscomb v. Schofner*, 96 Tenn. 112 (1896); *Closson v. Staples*, 42 Vt. 209.

In *Allen v. Codman*, 139 Mass. 136 (1885), an action for the malicious prosecution of an action of ejectment "the main question," is said by Holmes, J., "to be whether the court below was right in ruling that there was probable cause for the defendant's suit in ejectment."

¹ In *Heyne v. Blair*, 62 N. Y. 19 (1875), probable cause is said to be "such a state of fact and circumstances as would lead a man of ordinary caution and precedence, acting conscientiously, impartially, reasonably and without prejudice upon the facts within his knowledge, to believe the party accused is guilty;" accord: *Jordan v. Alabama G. S. R. Co.*, 81 Ala. 220 (1887), p. 226; *Kansas & Tex. Coal Co. v. Galloway*, 71 Ark. 351 (1903), somewhat similar is the language of Shaw, C. J., in *Bacon v. Towne*, 4 Cush.

upon the actual guilt of the person prosecuted, but may rest upon the prosecutor's belief in his guilt when based on reasonable grounds. One may act upon what appears to be true, even if it turns out to be false, provided he believes it to be true² and the appearances are sufficient to justify the belief as reasonable. Belief alone, however sincere, is not sufficient, for it must be founded on circumstances which make the belief reasonable. If probable cause exists, it is an absolute protection against an action for ma-

217 (Mass. 1849), and *Sterrett, J.*, in *McClafferty v. Philp*, 151 Pa. St. 86 (1892), and see *Tindal, C. J.*, in *Broad v. Ham*, 5 Bingh. N. C. 722 (1839), p. 725, "There must be a reasonable cause—such as would operate in the mind of a discreet man; there must also be probable cause—such as would operate in the mind of a reasonable man;" and *Weaver, J.*, in *Flam v. Lee*, 116 Iowa 289 (1902), p. 298, and *Day, C.*, in *Bank of Miller v. Richmon*, 64 Nebr. 111 (1902), *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493 (1888), *Robitzek v. Daum*, 220 Pa. St. 61 (1908), and *Davis v. McMillan*, 142 Mich. 391 (1905), where the question of probable cause is said to depend upon what "an ordinarily fair and careful business man" would be likely to believe.

In some cases it is said that there must be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offense with which he is charged"; *Munns v. Dupont de Nemours*, 3 Wash. C. C. 31 (1811); *Foshay v. Ferguson*, 2 Denio 617 (N. Y. 1846); *Richev v. McBean*, 17 Ill. 63 (1855); *Wilson v. Bowen*, 64 Mich. 133 (1887); *Cole v. Curtis*, 16 Minn. 182 (1870); *Ash v. Marlow*, 20 Ohio 119 (1853); but in *McClafferty v. Philp*, 151 Pa. St. 86 (1892), the word "cautious" is held to be improper since it "suggests the idea of timidity"; accord: *Eggett v. Allen*, 106 Wis. 633 (1900), but see same case 119 Wis. 625 (1903).

Information from reputable sources may furnish reasonable cause, *Lister v. Perryman*, L. R., 4 H. L. (E. & I. App.) 521 (1870); *Bank of Miller v. Richmon*, 64 Nebr. 111 (1902); *Wilson v. Bowen*, 64 Mich. 133 (1887); *Baldwin v. Von der Ahe*, 184 Pa. St. 116 (1898); *Smith v. Ege*, 52 Pa. 419 (1866), defendant acted on information of a detective employed by him to investigate a crime; and this though the informant being an alleged accomplice of the plaintiff, could not testify against him, *Dawson v. Vansandau*, 11 W. R. 516 (1863). It is held in *Hicks v. Faulkner*, L. R. 8 Q. B. Div. 167 (1878), that a defendant is acting reasonably in trusting to his memory which has in the past proved reliable, though on the particular occasion it plays him false.

The defendant's mistake may be one of fact, he may have suspected the plaintiff of criminal acts which he has never committed, or he may have erroneously believed that the plaintiff's actual conduct constituted the crime charged. Some cases intimate that an accuser, if he chooses to act without legal advice, must at his peril know the law, *Wills v. Noyes*, 12 Pick. 324 (Mass. 1832); *Urban v. Tyska*, 16 Dist. R. 625 (Pa. 1907); *Gaertner v. Heyl*, 179 Pa. St. 391 (1897); *Hall v. Hawkins*, 5 Humph. 357 (Tenn. 1844); while *Whipple v. Gorsuch*, 82 Ark. 252 (1907), holds that a "well founded doubt as to the law may constitute probable cause * * * the same as a doubt concerning the facts," *Bramwell, B.*, in *Johnson v. Emerson*, L. R. 6 Exch. p. 329 (1871), *semble*, where the defendant was a solicitor prosecuting bankruptcy proceedings for a client. Where, however, the mistake is as to a difficult and disputed question of law, it is held that such mistake honestly entertained is reasonable cause, *Philipps v. Naylor*, 4 H. & N. 565 (1859), *McCoy v. Kalbach*, 51 Pa. Super. Ct. 364 (1912), but see *Nehr v. Dobbs*, 47 Nebr. 863 (1896).

²"It would be quite outrageous if, where a party is proved to believe a charge is unfounded, it were to be held that he could have reasonable and probable cause," Lord Denman, C. J., in *Haddrick v. Heslop, and Raine*, 12 Ad. & E. (N. S.) (Q. B.) 267 (1848); *Broad v. Ham*, 5 Bing. N. C. 722 (1839); *Turner v. Ambler*, 10 A. & E. (N. S.) (Q. B.) 252 (1847); *Ball v.*

licious prosecution, even when express malice is proved.³ Thus an innocent person may be prosecuted unjustly and subjected to expense and disgrace with no right to call the prosecutor to account, provided he acted upon an honest and reasonable belief in commencing the proceeding complained of. Peace and good order exact this hardship from the individual for the benefit of the people at large, so that citizens may not be prevented by the fear of the consequences from attempting to assert their own rights or to vindicate the cause of public justice by an appeal to the courts. (*Hazard v. Flury*, 120 N. Y. 223; *Heyne v. Blair*, 62 N. Y. 19; *Farnam v. Feeley*, 56 N. Y. 451; *Carl v. Ayers*, 53 N. Y. 14; *Long Island Bottlers' Union v. Seitz*, 180 N. Y. 243; *Foshay v. Ferguson*, 2 Den. 617; *Bishop on Non-Contract Law*, 238; *Bigelow on Torts*, 194; *Addison on Torts*, 592; *Newell on Malicious Prosecution*, 252.)

Probable cause is always a question of law for the court, to be decided outright if there is no conflict in the evidence, otherwise by instructing the jury as to what facts if found will establish a want of probable cause.⁴ In the case now before us the trial

Rawls, 93 Cal. 222 (1892); *Donnelly v. Burkett*, 75 Iowa 613 (1887); *Peck v. Chouteau*, 91 Mo. 138 (1886); *Kniscley v. Shenberger*, 7 Watts 193 (Pa. 1838); *Spear v. Hiles*, 67 Wis. 350 (1886). It is constantly said that the defendant's belief in the plaintiff's guilt must be "honest" as well as reasonable, *Mitchell v. Wall*, 111 Mass. 492 (1873); *El Reno Gas Co. v. Spurgeon*, 30 Okla. 88 (1911); *Stewart v. Sonneborn*, 98 U. S. 187 (1878). So it is said that the test is the defendant's belief based on reasonable grounds, *Mitchell v. Logan*, 172 Pa. St. 349 (1896).

The innocence of the plaintiff is immaterial, *El Reno Gas &c. Co. v. Spurgeon*, 30 Okla. 88 (1911), the existence of probable cause depends on the sufficiency of the facts which are known or ought to have been known to defendant when he prosecuted the plaintiff, *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493 (1888); *Delegal v. Highley*, 3 Bingh. N. C. 950 (1837); *Mitchell v. Logan*, 172 Pa. St. 349 (1896); *Seibert v. Price*, 5 Watts & S. 438 (Pa. 1843); *Maynard v. Sigman*, 65 Nebr. 590 (1902); *Scott v. Shelor*, 28 Grat. 891 (Va. 1877); *contra*, *Vinal v. Core*, 18 W. Va. 1 (1881), discussing the earlier cases.

³ *Accord*: *Johnstone v. Sutton*, 1 T. R. 510 (1786), p. 545; *Mitchell v. Jenkins*, 5 B. & Ad. 588 (1833); *Turner v. Ambler*, 10 A. & E. (N. S.) 252 (1847); *Stewart v. Sonneborn*, 98 U. S. 187 (1878); *Jordan v. Alabama G. S. R. Co.*, 81 Ala. 220 (1886); *Renfro v. Prior*, 22 Mo. App. 403 (1886); *Foshay v. Ferguson*, 2 Denio 617 (N. Y. 1846), *Diets v. Langfitt*, 63 Pa. 234 (1869); this is equally so when the action is for maliciously instituting civil proceedings in which the person or property of the defendant therein is seized, *Emerson v. Cochran*, 111 Pa. St. 619 (1886).

⁴ "The question of probable cause is a mixed proposition of law and fact" says the court in *Johnstone v. Sutton*, 1 T. R. 510 (1786), "Whether the circumstances alleged to show it probable or not probable, are true and existed, is matter of fact; but whether supposing them true, they amount to probable cause, is a question of law; and upon this distinction proceeded the case of *Reynolds v. Kennedy*." It is however a question of law only in sense that it is to be determined by the judge, see *Lords Chelmsford* and *Westbury* in *Lister v. Perryman*, L. R. 4 E. & I. App. 521 (1870), the latter regretting that the existence of such cause, which he says is "an inference of fact" which "must be derived from all the circumstances of the case," "is an inference to be drawn by the judge and not by the jury"; see also, *Panton v. Williams*, 2 Ad. & E. (N. S.) 169 (1841). As to the practice in the earlier writ of conspiracy, see *Coxe v. Wirrall*, Cro. Jac. 193. The

judge decided that probable cause existed and although he gave a wrong reason for his decision, we think his conclusion was right. The *prima facie* case made out by the order granting the injunction was not overcome by the other evidence introduced by the plaintiffs. The case presented by them in the state court, so far as the question of probable cause is concerned, differed in no controlling feature from that presented to the Federal court when the injunction was granted. Aside from the alleged infringement of the registered trade-mark, there was still a *prima facie* case of infringement of the common-law trade-mark. While some new facts were proved, it did not appear that they were known to the defendant when he applied for the injunction. With some difference in detail, there was a general resemblance in the size, color and appearance of the cough drops and packages used by the respective parties. The defendant had used his design in substantially the same form for nearly twenty years until it had become generally known as his property. It had been protected by the judgments and orders of both state and federal courts in many cases.

The burden of proof was upon the plaintiffs to establish a want of probable cause, but we think their own evidence shows that the defendant had probable cause to commence the action and procure the injunction, because the packages and drops of the plaintiff resembled his own so closely as to be "calculated to deceive the careless and unwary." The average purchaser would not know the difference.

weight of American authority is accord: *Stewart v. Sonneborn*, 98 U. S. 187 (1878); *Whipple v. Gorsuch*, 82 Ark. 252 (1907); *Holliday v. Holliday*, 123 Cal. 26 (1898), compare *Johnson v. Miller*, 63 Iowa 529 (1884), with 69 Iowa 562 (1886), *Ahrens v. Hoehner*, 106 Ky. 692 (1899); *Cloon v. Gerry*, 13 Gray 201 (Mass. 1859); *Wilson v. Bowen*, 64 Mich. 133 (1887); *Bank of Miller v. Richmon*, 64 Nebr. 111 (1902); *Rawson v. Leggett*, 184 N. Y. 504 (1906); *Jones v. W. & W. R. Co.*, 125 N. Car. 227 (1889); *Robitsek v. Daum*, 220 Pa. St. 61 (1908); see, however, *Ritter v. Ewing*, 174 Pa. St. 341 (1896). But see *Krehbiel v. Henkle*, 142 Iowa 677 (1909), and *Stubbs v. Mulholland*, 168 Mo. 47 (1901); *Harris v. Quincy, Omaha & Kansas City R. Co.*, 172 Mo. App. 261 (1913), with which compare *Carp v. Queen Ins. Co.*, 203 Mo. 295 (1907), p. 351, and *Smith v. Glynn*, 144 S. W. 149 (Mo. App. 1912).

As to the proper method to be pursued by the court when the facts are in dispute, see Bowen, J., in *Abrath v. N. E. R. Co.*, L. R. 11 Q. B. Div. 79 (1883), p. 455, where he points out three methods by which, where the functions of the court and jury can be principally adjusted, where there is conflicting evidence as to the facts alleged to show the presence or absence of probable cause: (1) To charge a jury generally as to the effect of the evidence, leaving them to give a general verdict. This, as he points out, is extremely difficult to do clearly and satisfactorily where the facts are at all complicated. (2) To instruct the jury as to what facts, if proved, would show probable cause or show the absence thereof, leaving to them to determine which state of facts exist and to render a verdict in accordance with such state of evidence. This is the course usually pursued in America. (See cases above cited and *Thomas v. Smith*, 51 Mo. App. 605 (1892).) (3) To require the jury to give a special verdict setting forth the actual state of facts which they find to exist. This practice, while usual in England, is hardly ever followed in America.

MUNNS v. DUPONT ET AL.

Circuit Court of United States, 1811. 3 B. Wash. U. S. C. C. 31.

WASHINGTON, J. (charging the jury). The question upon which this cause must be decided, is not whether the plaintiff has suffered from a charge of which the defendants were the authors, and which was not founded in truth, but whether the charge was made maliciously, and without probable cause. In trials of actions of this nature, it is of infinite consequence to mark with precision, the line to which the law will justify the defendant in going, and will punish him if he goes beyond it. On the other hand, public justice and public security require, that offenders against the laws should be brought to trial and punishment, if their guilt be established. Courts and juries, and the law officers, whose duty it is to conduct the prosecution of public offenders, must in most instances, if not in all, proceed upon the information of individuals; and if these actions are too much encouraged,—if the informer acts upon his own responsibility, and is bound to make good his charge at all events, under the penalty of responding in damages to the accused, few will be found bold enough, at so great a risk, to endeavor to promote the public good. The informer can seldom have a full view of the whole ground, and must expect to be frequently disappointed, by evidence which the accused only can furnish. Even if he be possessed of the whole evidence, he may err in judgment; and in many instances a jury may acquit, where to his mind the proofs of guilt were complete. It is not always the fate of those to command success, who deserve it.

On the other hand, the rights of individuals are not to be lightly sported with; and he who invades them, ought to take care that he acts from pure motives, and with reasonable caution. For the integrity of his own conduct, he must be responsible; and his sincerity must be judged of by others, from the circumstances under which he acted. If, without probable cause, he has inculpated another, and subjected him to injury, in his person, character, or estate, it is fair to suspect the purity of his motives, and the jury are warranted in presuming malice. But though malice should be proved, yet if the accusation appear to have been founded upon probable ground of suspicion, he is excused by the law. Both must be established against him viz. malice, and the want of probable cause. Of the former, the jury are exclusively the judges—the latter, is a mixed question of fact and law. What circumstances are sufficient to prove a probable cause, must be judged of, and decided by the court. But to the jury it must be referred, whether the circumstances which amount to probable cause, are proved by credible testimony or not.

BOWEN, L. J. in *Abrath v. North Eastern Ry. Co.* (1883), Law Reports 1882-83, 11 Q. B. D. 440. This action is for malicious prosecution, and in an

action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice. All those three propositions the plaintiff has to make out, and if any step is necessary to make out any one of those three propositions, the burden of making good that step rests upon the plaintiff.

SKEFFINGTON v. EYLWARD.

Supreme Court of Minnesota, 1906. 97 Minn. Rep. 244.

START, C. J. This is an appeal by the defendant from an order of the district court of the county of Rice denying his motion for a new trial in an action for malicious prosecution, in which there was a verdict for the plaintiff for \$250.

The undisputed evidence establishes these facts: The defendant was chairman of the board of town supervisors of the town of Webster. Complaint having been made to him that the plaintiff had obstructed a public highway of the town, he investigated the charge, consulted with the county attorney with reference to the matter, and then made a complaint before the municipal court of the city of Northfield charging the plaintiff with such offense. The plaintiff pleaded not guilty to the charge, but upon a trial by the judge without a jury he was found guilty, and appealed from the judgment to the district court. The cause was dismissed and the plaintiff discharged in the district court upon motion of the county attorney.

1. The first contention of the defendant is that the conviction of the plaintiff by the municipal court is conclusive evidence that the defendant had probable cause for instituting the prosecution. Therefore there was no evidence to support the verdict. The jurisdiction of the municipal court of the city of Northfield in criminal cases triable within the county is the same as that of justice of the peace. We have, then, the question whether the conviction of a party in a justice or municipal court, which is reversed on appeal of the case to the district court, is conclusive or prima facie evidence of probable cause for instituting the prosecution.

A number of cases, especially the earlier ones, holding that if the defendant in a criminal proceeding is convicted in the first instance, and appeals, and is acquitted in the appellate court, the conviction below is nevertheless conclusive of probable cause for his prosecution.¹ Cooley, Torts, *185. Another class of cases, perhaps the greater number, hold that a judgment convicting the defendant

¹ *Reynolds v. Kennedy*, 1 Wils. 232 (1748); *Herman v. Brookerhoff*, 8 Watts 240 (Pa. 1839), *semble*; *Whitney v. Peckham*, 15 Mass. 243 (1818); *Morrow v. Wheeler & Wilson Mfg. Co.*, 165 Mass. 349 (1896).

in a criminal case, although reversed on appeal and the defendant acquitted, is conclusive proof of probable cause in an action by the defendant to recover damages for malicious prosecution, unless he alleges and proves that the judgment was obtained by fraud or perjury.² Newell, Mal. Pros. 299; 19 Am. & Eng. Ency. (2d Ed.) 667. A third class of cases holds that a judgment convicting the defendant in a criminal proceeding, which is reversed on appeal, is not conclusive, but prima facie evidence of probable cause, which may be rebutted by any competent evidence which clearly overcomes the presumption arising from the fact of the defendant's conviction in the first instance. 1 Jaggard, Torts, 618; *Burt v. Place*, 4 Wend. 591; *Nicholson v. Sternberg*, 61 App. Div. 51, 70 N. Y. Supp. 212; *Goodrich v. Warner*, 21 Conn. 432; *Ross v. Hixon*, 46 Kans. 550, 26 Pac. 955, 12 L. R. A. 760, 26 Am. St. Rep. 123; *Barber v. Scott*, 92 Iowa, 52, 59, 60 N. W. 497; *Nehr v. Dobbs*, 47 Neb. 863, 66 N. W. 864; *Bechel v. Pacific*, 65 Neb. 826, 91 N. W. 853.³

² *Accord: Crescent City Live Stock Landing &c. Co. v. Butchers' Union &c. Co.*, 120 U. S. 141 (1887); *Holliday v. Holliday*, 123 Cal. 26 (1898), justice of the peace binding plaintiff over to keep the peace; *Thomas v. Muehlmann*, 92 Ill. App. 571 (1900); *Adams v. Bicknell*, 126 Ind. 210 (1890); *Blucher v. Zonker*, 19 Ind. App. 615 (1898); *Bowman v. Brown*, 52 Iowa 437 (1879); *Wilham v. Gowen*, 14 Maine 362 (1837); *Payson v. Caswell*, 22 Maine 212 (1842); *Cloon v. Gerry*, 13 Gray 201 (Mass. 1859), *semble*; *Schneider v. Montrose*, 158 Mich. 263 (1909); *Boogher v. Hough*, 99 Mo. 183 (1889); *Burt v. Place*, 4 Wend. 591 (N. Y. 1830), *semble*; and see *Burt v. Smith*, 181 N. Y. 1 (1905); *Grohmann v. Kirschman*, 168 Pa. St. 189 (1895), *semble*; *Welch v. Boston & P. R. Corp.*, 14 R. I. 609 (1884); *Saunders v. Baldwin*, 112 Va. 431 (1911). In *Short v. Spragins*, 104 Ga. 628 (1898), an order of a superior court granting an injunction and appointing a receiver was held to have a similar effect, *aliter*, where a court merely awards a temporary and provisional injunction *pendente lite*, *Burt v. Smith*, 181 N. Y. 1 (1905). A distinction is drawn in Indiana between a reversal of the judgment of an inferior court and such court's own action in setting aside a conviction before it and granting a new trial, which is said to put the case as though it had never been tried, so that the conviction is no evidence of probable cause, *Richter v. Koster*, 45 Ind. 440 (1874).

A distinction is also sometimes made between a conviction by a magistrate having power to try the charge and the action of an examining or committing magistrate in binding over or committing the plaintiff, which latter is held to be prima facie evidence only, see *Israel v. Brooks*, 23 Ill. 575 (1860); *Spalding v. Lowe*, 56 Mich. 366 (1885); *Ross v. Hixon*, 46 Kans. 550 (1891), and cases cited therein; see also, *Johnston v. Meagher*, 14 Utah 426 (1894).

³ "If, upon a full and fair trial, the evidence against the plaintiff was sufficient to satisfy the court of his guilt, that circumstance will afford strong presumptive evidence of probable cause"—Waite, J. in *Goodrich v. Warner*. "If," says Williams, J., in *Nicholson v. Sternberg*, "the case is so weak that the defendant would be charged with want of probable cause in the absence of the decision of the justice, all rights the defendant is entitled to will be secured to him by making the decision *prima facie* evidence of probable cause, and requiring the plaintiff to overcome this *prima facie* case, and leaving the whole question of fact to the jury." In *Moffatt v. Fisher*, 47 Iowa 473 (1877); *Olson v. Neal*, 63 Iowa 214 (1884), and *Nehr v. Dobbs*, it was held that the *prima facie* effect of a conviction as of probable cause could be rebutted by showing that it was due to an error of law on the part of the judge, justice, or magistrate, while in *Bechel v. Pac. etc. Co.*, committal by examining magistrate, *Maynard v. Sigman*, 65 Nebr. 590 (1902), a conviction by justices, it was said to be rebuttable by any evidence which destroyed its

It is difficult to see any substantial distinction between the first and second class of cases to which we have referred.⁴ If the pre-

probative value, while in *Barber v. Scott*, it was held that a verdict for the plaintiff would stand, though he had been convicted by a justice of the peace, if the jury could properly find that the defendant knew all the material facts and they were insufficient in law to support the charge, so that he must be taken to know their insufficiency. In *McDonald v. Schroeder*, 214 Pa. St. 411 (1906), it was held that where the defendant admitted on the trial of the original prosecution that he brought it for the improper purpose of collecting a debt due by the plaintiff, is bound to show that he had probable cause to believe him guilty of the crime charged notwithstanding the fact that he had been convicted.

In many jurisdictions the plaintiff's discharge by a justice of the peace or committing magistrate is held to be *prima facie* evidence of want of probable cause, *Barnholdt v. Souillard*, 36 La. Ann. 103 (1884); *Frost v. Holland*, 75 Maine 108 (1883); *Straus v. Young*, 36 Md. 246 (1872); *Thomas v. Smith*, 51 Mo. App. 605 (1892); *Stubbs v. Mulholland*, 168 Mo. 47 (1902), at least when coupled with proof of the plaintiff's good character; *Johnston v. Martin*, 3 Murph. 248 (N. Car. 1819); *Rosenkrantz v. Haas*, 20 N. Y. S. 880 (1892); *Bernar v. Dunlap*, 94 Pa. 329 (1880), unless the evidence produced by the plaintiff shows that the defendant had reasonable ground to believe the plaintiff guilty; *Madison v. R. Co.*, 147 Pa. St. 509 (1892); *Barhight v. Tammany*, 158 Pa. St. 545 (1893), *aliter* when discharge is because of the magistrate's lack of jurisdiction, *McClafferty v. Philp*, 151 Pa. St. 86 (1892); *Williams v. Norwood*, 2 Yerg. 329 (Tenn. 1829); *Jones v. Finch*, 84 Va. 204 (1887); *Vinal v. Core*, 18 W. Va. 1 (1881); *Eggett v. Allen*, 119 Wis. 625 (1903); *Chapman v. Dodd*, 10 Minn. 350 (1865), if solely upon the defendant's testimony, *aliter* if after both sides, *Cole v. Curtis*, 16 Minn. 182 (1870); *accord: Barbour v. Gettings*, 26 U. C. Q. B. 544 (1867); see also, *Flickinger v. Wagner*, 46 Md. 580 (1877), where a discharge by a magistrate, unable to decide on conflicting testimony and giving the accused the benefit of the doubt, held not to make a *prima facie* case. *Contra: Harkrader v. Moore*, 44 Cal. 144 (1872); *Israel v. Brooks*, 23 Ill. 575 (1860); *Wright v. Fansler*, 90 Ind. 492 (1883); *Davis v. McMillan*, 142 Mich. 391 (1905); *Heldt v. Webster*, 60 Tex. 207 (1883). The fact that the grand jury ignores the bill is held in *Apgar v. Woolston*, 43 N. J. L. 57 (1881), and *Le Maistre v. Hunter*, Brightly N. P. 494 (Pa. 1851), to be no evidence of want of probable cause.

On the other hand an acquittal after the trial is generally held neither to make a *prima facie* case shifting the burden of proof nor to be of itself sufficient evidence to support a verdict for the plaintiff, *Thompson v. Beacon Valley Co.*, 56 Conn. 493 (1888); *Bitting v. Ten Eyck*, 82 Ind. 421 (1882); *Garrard v. Willet*, 4 J. J. Marsh. 628 (Ky. 1830), where, however, the plaintiff had been committed for trial by a magistrate; *Stone v. Crocker*, 24 Pick. 81 (Mass. 1831); *Britton v. Granger*, 13 Ohio C. C. 281 (1897); *Eastman v. Monnastes*, 32 Ore. 291 (1898). And this is so even in jurisdictions holding that a discharge by an examining magistrate makes out a *prima facie* case, *Staub v. Van Benthuyzen*, 36 La. Ann. 467 (1884); *Boeger v. Langenberg*, 97 Mo. 390 (1888); *Christian v. Hanna*, 58 Mo. App. 37 (1894); *Bell v. Percy*, 11 Ired. 233 (N. Car. 1850); and see *Vinal v. Core*, *supra*, and *Hale v. Boylen*, 22 W. Va. 234 (1883); *contra, Whitfield v. Westbrook*, 40 Miss. 311 (1866), and *Miller v. Hammer*, 141 Pa. St. 196 (1891), with which, however, compare *Grohmann v. Kirschman*, 168 Pa. St. 189 (1895). In some jurisdictions it is held to be no evidence of want of probable cause, *Skidmore v. Bricker*, 77 Ill. 164 (1875); *Bekkeland v. Lyons*, 96 Tex. 255 (1903), 64 L. R. A. 474 with valuable note; *Stewart v. Sonneborn*, 98 U. S. 187 (1878), *semble*.

⁴In some jurisdictions a conviction is conclusive though procured by fraud, false testimony or by preventing the accused producing exculpatory facts, known by the defendant to exist, *Clements v. Odorless etc. Co.*, 67 Md. 461 (1887), *Bryan, J., diss.*, p. 605; *Parker v. Huntington*, 7 Gray 36 (Mass.

sumption of probable cause, arising from a judgment in the first instance which is reversed on appeal, can only be rebutted by alleging and proving that the judgment was obtained by fraud or perjury, then the judgment is practically conclusive evidence of a probable cause, because any judgment, although it imports absolute verity, may be impeached for fraud or perjury in a proper action or proceeding. The true and logical reason why a conviction, reversed on appeal and the defendant discharged, is relevant evidence on the issue of probable cause, is not that the judgment imports absolute verity; for, after the reversal and discharge there is in fact and law no judgment. The true reason, as stated in the case of *Nehr v. Dobbs*, *supra*, is the fact that, ordinarily, if a court having jurisdiction has upon a full and fair trial proceeded to conviction, it must have had before it such evidence as would convince a prudent and reasonable man of the guilt of the accused. Therefore, while a subsequent reversal may show that the accused was in fact innocent, yet it does not show that there was no probable cause for believing him guilty.

If such be the basis for receiving in evidence a judgment, which has been reversed, on a trial of the question of probable cause, it logically follows that it is not conclusive, but *prima facie*, evidence of probable cause, which is entitled to serious consideration in determining the issue. It follows that, the presumption arising from such evidence being a rebuttable one, the evidence to rebut it cannot be limited to a direct impeachment of the judgment for fraud or perjury, but that any competent evidence is admissible which tends to show that the prosecutor did not have probable cause. We accordingly hold that, in an action for malicious prosecution, a conviction of the plaintiff, which was reversed on appeal and the plaintiff discharged, is not conclusive, but strong *prima facie*, evidence of probable cause, which may be rebutted, not only by evidence tending to show that the conviction was obtained by fraud or perjury, but also by any competent evidence which satisfies the jury that the prosecutor did not have probable cause for instituting the prosecution.

Order affirmed.

RAVENGA v. MACKINTOSH.

Court of King's Bench, 1824. 2 Barnewall & Cresswell 693.

The Lord Chief Justice directed the jury to find a verdict for the defendant, if they were of opinion that, at the time when the arrest was made, *Mackintosh* acted truly and sincerely upon the faith of the opinion given by his professional adviser, actually believing that *Ravenga* was personally liable, and that he might be lawfully arrested, and that he (*Mackintosh*) could recover in that action; but to find for the plaintiff, if they were of opinion that

1856), but compare *Cloon v. Gerry*, 13 Gray (Mass.) 201; *Griffis v. Sellars*, 2 Dev. & B. 492 (N. Car. 1837); *Smith v. Thomas*, 149 N. Car. 100 (1908), *semble*.

Mackintosh believed that he must fail in the action, and that he intended to use the opinion as a protection, in case the proceedings were afterwards called in question; and that he made the arrest, not with a view of obtaining his debt, but to compel the plaintiff to sanction his debentures. The jury found a verdict for the plaintiff with £250 damages.

The *Attorney-General* now moved for a new trial.

BAYLEY J. I have no doubt that in this case there was a want of probable cause. I accede to the proposition, that if a party lays all the facts of his case fairly before counsel,¹ and acts bona fide upon the opinion given by that counsel² (however erroneous that opinion may be)³ he is not liable to an action of this description. A party, however, may take the opinions of six different persons, of

¹ *Accord: Steed v. Knowles*, 79 Ala. 446 (1885); *Ross v. Innis*, 35 Ill. 487 (1864); *Smith v. Walter*, 125 Pa. St. 453 (1889); *Stewart v. Sonneborn*, 98 U. S. 187 (1878); *Tompson v. Mussey*, 3 Maine 305 (1825); *Cooper v. Utterbach*, 37 Md. 282 (1872); *Wakely v. Johnson*, 115 Mich. 285 (1897); *Bell v. Atlantic City R. Co.*, 58 N. J. L. 227 (1895); *Radcliffe v. Hollyfield*, 216 Pa. 367 (1907), see *Barhight v. Tammany*, 158 Pa. St. 545 (1893). As to the effect of failure to state facts in the bona fide but mistaken belief that they are not material, compare *Hill v. Palm*, 38 Mo. 13 (1866); *Sharpe v. Johnston*, 59 Mo. 557 (1875), and *Dunlap v. New Zealand Fire & Ins. Co.*, 109 Cal. 365 (1895), with *Baldwin v. Weed*, 17 Wend. 224 (N. Y. 1837), and *Harris v. Woodford*, 98 Mich. 147 (1893). Many jurisdictions hold that he must disclose also facts which he could have discovered had he used reasonable diligence, *Steed v. Knowles*, 79 Ala. 446 (1885); *Wyatt v. Burdette*, 43 Colo. 208 (1908); *Ross v. Innis*, 35 Ill. 487 (1864); *Galloway v. Stewart*, 49 Ind. 156 (1874); *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa 153 (1905); *Stevens v. Fassett*, 27 Maine 266 (1847); *Stubbs v. Mulholland*, 168 Mo. 47 (1902); *Carp v. Queen Insurance Co.*, 203 Mo. 295 (1907), and see *Moore v. R. Co.*, 37 Minn. 147 (1887), and *Johnson v. Miller*, 69 Iowa 562 (1886). *Contra, Dunlap v. New Zealand Fire & Ins. Co.*, 109 Cal. 365 (1895); *Gillispie v. Stafford*, 96 N. W. 1039 (Nebr. 1903); *Hess v. Oregon German Baking Co.*, 31 Ore. 503 (1897); *King v. Apple River Power Co.*, 131 Wis. 575 (1907). If the defendant, subsequent to the consultation, learn of material facts he cannot rely on the advice seriously received as a protection, *Dunlap v. New Zealand Fire & Ins. Co.*, 109 Cal. 365 (1895); *Ash v. Marlow*, 20 Ohio 119 (1851), and for a full citation and valuable discussion of the American decisions on these points and the whole subject of the principal case see the notes to *Van Meter v. Bass*, 18 L. R. A. (N. S.) 49 (1909).

² *Accord: McLeod v. McLeod*, 73 Ala. 42 (1882); *Clement v. Major*, 8 Colo. App. 86 (1896); *Ross v. Innis*, 35 Ill. 487 (1864); *Kimmel v. Henry*, 64 Ill. 505 (1872), prosecution instituted for improper purpose; *Fisher v. Forrester*, 33 Pa. 501 (1859); *Neufeld v. Rodeminski*, 144 Ill. 83 (1893). See also, the cases collected in 18 L. R. A. (N. S.) 62 to 65. An opinion given after the prosecution is of course no justification therefor, *Blunt v. Little*, 3 Mason 102 (U. S. 1822); *Murphy v. Eidlits*, 121 App. Div. 224 (N. Y. 1907), but see *Hopkins v. McGillicuddy*, 69 Maine 273 (1879).

The advice of counsel affords no protection if the defendant in fact does not believe the plaintiff guilty, *Stewart v. Sonneborn*, 98 U. S. 187 (1878); *Dawson v. Schloss*, 93 Cal. 194 (1892); *Connelly v. White*, 122 Iowa 391 (1904); *Hyde v. Greuch*, 62 Md. 577 (1884); *Haas v. Powers*, 130 Wis. 406 (1906); *Harris v. Woodford*, 98 Mich. 147 (1893); *Sparling v. Conway*, 75 Mo. 510 (1882), and see 18 L. R. A. (N. S.) 63-64.

³ *Accord: Steed v. Knowles*, 79 Ala. 446 (1885); *Neufeld v. Rodeminski*, 144 Ill. 83 (1893); *Paddock v. Watts*, 116 Ind. 146 (1888); *Fleckinger v. Taffee*, 149 Mich. 678 (1907); *Cooper v. Flemming*, 114 Tenn. 40 (1904), especially if the persons consulted are prosecuting officers of the state,

which three are one way and three another.⁴ It is therefore a question for the jury, whether he acted bona fide on the opinion, believing that he had a cause of action. The jury in this case have found, and there was abundant evidence to justify them in drawing the conclusion, that the defendant did not act bona fide, and that he did not believe that he had any cause of action whatever. Assuming that the defendant's belief that he had a cause of action would amount to a probable cause, still, after the jury have found that he did not believe that he had any cause of action whatever, the judge would have been bound to say, that he had not reasonable or probable cause of action.

Rule refused.⁵

Laughlin v. Clawson, 27 Pa. 328 (1856); *Smith v. Austin*, 49 Mich. 286 (1882); *Amb's v. A. T. & S. F. R. Co.*, 114 Fed. 317 (1899). In *Hazzard v. Flury*, 120 N. Y. 223 (1890), Parker, J., held that the fact that the defendant's counsel may have mistakenly advised him "while proper on the question of malice, does not form the basis for a finding of fact that he had probable cause to believe the plaintiff guilty of larceny. Probable cause," he says, "may be founded on misinformation as to the facts but not as to the law;" and see *Lange v. Ill. Cent. R. Co.*, 107 La. 687 (1902). The Georgia Civil Code of 1910, § 4958, makes the defendant responsible for acting on erroneous legal advice and gives him an action over against his adviser, *Luke v. Hill*, 137 Ga. 159 (1911). On the whole subject see 18 L. R. A. (N. S.) 67-68. Nor is the defendant responsible for the bad faith of his legal adviser, *Peterson v. Toner*, 80 Mich. 350 (1890), unless the two are in collusion, *Watt v. Corey*, 76 Maine 87 (1884), or knows he that it is given in bad faith, *Shea v. Cloquet Lumber Co.*, 92 Minn. 348 (1904), or is the adviser known to be prejudiced and partial, *Smith v. King*, 62 Conn. 515 (1893), and see 18 L. R. A. (N. S.) 66.

⁴ See *Stevens v. Fassett*, 27 Maine 266 (1847).

⁵ The advice must be given by a practicing lawyer of good reputation for competency and integrity, *Marks v. Hastings*, 101 Ala. 165 (1892); *Clement v. Major*, 8 Colo. App. 86 (1896); *Walter v. Sample, Schattgen v. Holmback*, 149 Ill. 646 (1894); *Stubbs v. Mulholland*, 168 Mo. 47 (1902); Heath, J., in *Hewlett v. Cruchley*, 5 Taunt. 277 (1813). The mere fact that the adviser is admitted to the bar or has a state license to practice law is not enough, *Roy v. Goings*, 112 Ill. 656 (1885); *Stubbs v. Mulholland*, 168 Mo. 47 (1902). The public prosecuting attorney is of course a proper person upon whose advice to rely, *Cooper v. Fleming*, 114 Tenn. 40 (1904); *Gilbertson v. Fuller*, 40 Minn. 413 (1889), but the advice of the defendant's regular counsel will protect him, *Kansas etc. Co. v. Galloway*, 71 Ark. 351 (1903), unless his previous connection with the matter or person's interest is such as to indicate that he is prejudiced, *Perrenoud v. Helm*, 65 Nebr. 77 (1902); *Charles City Plow & Co. v. Jones*, 71 Iowa 234 (1887); *White v. Carr*, 71 Maine 555 (1880). But if the defendant is himself a lawyer his own advice to himself is of course no defense, *Buck & Son Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. 233 (1903); *Terre Haute & I. R. Co. v. Mason*, 148 Ind. 578 (1897). The advice of a justice of the peace or magistrate, if a layman, is no protection, *Necker v. Bates*, 118 Iowa 545 (1902); *Olmstead v. Partridge*, 16 Gray 381 (Mass. 1860); but see *Monaghan v. Cox*, 155 Mass. 487 (1892); *Brobst v. Ruff*, 100 Pa. St. 91 (1882); *Beihofer v. Loeffert*, 150 Pa. St. 374 (1893); but in *Monaghan v. Cox*, 155 Mass. 487 (1892), it was held that such advice is evidence of probable cause. For a valuable collection of cases on the whole subject, see 18 L. R. A. (N. S.) 69-74.

The majority of jurisdictions regard the advice of counsel as proof of probable cause, *Stewart v. Sonneborn*, 98 U. S. 187 (1878); *Jordan v. Ala. G. S. R. Co.*, 81 Ala. 220 (1886); *Olmstead v. Partridge*, 16 Gray 381 (Mass. 1860); *Cooper v. Fleming*, 114 Tenn. 40 (1904); in others it is regarded as only evidence of the absence of malice, *Smith v. Glynn*, 144 S. W. 149 (Mo.

JOHNS v. MARSH.

Court of Appeals of Maryland, 1879. 52 Md. Rep. 323.

ALVEY, J. While the malice necessary to the right of recovery may not be deduced as a necessary legal conclusion from a mere act, irrespective of the motive with which the act was done, yet, any motive other than that of instituting the prosecution for the purpose of bringing the party to justice, is a malicious motive on the part of the person who acts under the influence of it.¹ As was accurately stated by Mr. Justice Parke, afterwards Baron Parke, in the case of *Mitchell v. Jenkins*, 5 B. & Ad., 594, "the term 'malice,' in this form of action, is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives." If, for example, a prosecution is initiated upon weak and unsubstantial ground for purposes of annoyance, or of frightening and coercing the party prosecuted into the settlement of a demand, the surrender of goods, or for the accomplishment of any other object, aside from the apparent object of the prosecution and the vindication of public justice, the party who puts the criminal law in motion under such circumstances lays himself open to the charge of being actuated by malice. Such motives are indirect and improper, and for the gratification of which the criminal law should not be made the instrument. *Add. on Torts*, pp. 594, 613; 2 *Greenl. Ev.*, sec. 453.²

App. 1912), in others as rebutting the inference of malice arising out of the absence of probable cause, *Brooks v. Bradford*, 4 Colo. App. 410 (1894); *McClafferty v. Phelps*, *supra*; *Lipowicz v. Jervis*, 209 Pa. 315 (1904); but see *Walter v. Sample*, *supra*, in others it is regarded as going to both probable cause and malice, *Flora v. Russell*, 138 Ind. 153 (1894); *Folger v. Washburn*, 137 Mass. 60 (1884); *Brinsley v. Schulz*, 124 Wis. 426 (1905), and see cases collected in 18 L. R. A. (N. S.) 51-54.

¹ A suit is malicious if actuated by actual ill will, which may be shown by any evidence tending to prove its existence, as threats made, *Brooks v. Jones*, 33 N. Car. 260 (1850), *Thurston v. Wright*, 77 Mich. 96 (1889); or a quarrel with plaintiff's family, *Long v. Rodgers*, 19 Ala. 321 (1851); see also, *Vanderbilt v. Mathis*, 5 Duer 304 (N. Y. 1856).

² *Accord: Metropolitan Life Ins. Co. v. Miller*, 114 Ky. 754 (1903), malice may be inferred from the use of criminal process to compel the plaintiff to settle a disputed claim, *Whiteford v. Henthorn*, 10 Ind. App. 97 (1894); *Krug v. Ward*, 77 Ill. 603 (1875), or to give up property, *Grinnell v. Stewart*, 32 Barb. 544 (N. Y. 1860); *Peterson v. Reisdorph*, 49 Nebr. 529 (1896); *Gallaway v. Burr*, 32 Mich. 332 (1875); *Kelly v. Sage*, 12 Kans. 109 (1873); *Gabel v. Weisensee*, 49 Tex. 131 (1878); *Reed v. Loosemore*, 197 Pa. 261 (1900)—but such inference is merely one of fact and can not be rebutted, *Wenger v. Philips*, 195 Pa. St. 214 (1900)—or to extort a confession as to the plaintiff's supposed accomplices, so as to locate stolen property, *Burk v. Howley*, 179 Pa. St. 539 (1897), but to prosecute for the sake of making the plaintiff an example is not evidence of malice, *Coleman v. Allen*, 79 Ga. 637 (1888). Nor does the fact that the ulterior object was to force the payment of a debt conclusively show malice where the defendant was also actuated by a desire to bring the plaintiff to justice, *Williams v. Keyes*, 9 Colo. App. 220 (1897), *Jackson v. Linnington*, 47 Kans. 396 (1891).

SCHOFIELD v. FERRERS.

Supreme Court of Pennsylvania, 1864. 47 Penna. 194.

STRONG, J. But the court instructed the jury that if there was not probable cause, they should find for the plaintiff. This was leaving out of view the second essential to the maintenance of such an action, namely, whether the prosecution was instituted maliciously, a question always for the jury, and one which must be proved affirmatively to entitle the plaintiff to a verdict. It is true, that want of probable cause is evidence of malice, but it is not malice itself. It is to be submitted to the jury for them to draw the proper inference. This appears to be almost, if not quite, the universal rule. How a criminal prosecution can be without malice, when it is instituted without probable cause; how it can have originated from any other than bad motives, which the law denominates malice, is not very apparent in most cases, yet the authorities uniformly hold that absence of probable cause is only evidence of malice. It has not the force of a legal conclusion, and therefore the existence of malice is a fact to be found by a jury. It is true, there are certain things which, if proved, the law declares to be conclusive evidence of malice, but mere want of probable cause is not one of them. If a prosecution be instituted for the purpose of extorting money or other property, the law implies malice: *Prough v. Entriken*, 11 Pa. 81, and if in this case the prosecution against the plaintiff below was begun or continued to obtain a title to the horse alleged to have been stolen by him, that fact was conclusive evidence of malice, which the jury were bound to receive as such. Still it was for them to find whether such was the motive for the prosecution. This seems to have been inadvertently overlooked in the charge, very probably because the contest on the trial was mainly over the question whether there was probable cause for the prosecution. For this reason the judgment must be reversed.¹

¹ The earlier cases seem to regard the want of probable cause as matter tending to show the defendant's knowledge that the accusation is without foundation, or his lack of sincere belief in the plaintiff's guilt, the absence of which of course makes the prosecution malicious, see Redfield, C. J., in *Barron v. Mason*, 31 Vt. 189 (1858), p. 197, and so as evidence from which malice can be inferred, see *Johnstone v. Sutton*, 1 T. R. 510 (1785), p. 544, "from the want of probable cause, malice may be, and most commonly is, implied," "to support the verdict, there was nothing necessary to be proved, but that there was no probable cause, from whence the jury might imply malice and might imply that the defendant knew there was no probable cause," *Ellenborough, C. J.*, in *Purcell v. McNamara*, 9 East 361 (1808), "the want of probable cause may be so strong and plain as to amount to evidence of malice," *Shaw, C. J.*, in *Willis v. Noyes*, 12 Pick. 324 (Mass. 1832), "The groundlessness of the suit may in some instances be so obvious and palpable that the existence of malice may be inferred from it," *Billings v. Chapin*, 2 Ill. App. 555 (1878), "malice might not be inferred unless the charge is wilfully false", see also, *Story, J.*, in *Wiggin v. Coffin*, 3 Story 1 (1836), and *Bicknell, C. C.*, in *Bitting v. Ten Eyck*, 82 Ind. 421 (1882). On the other hand it is said in some cases that "the want of proper motive inferable from a wrongful act, (a prosecution in fact enforced) based on no reasonable

THE SOUTH ROYALTON BANK v. THE SUFFOLK BANK.

Supreme Court of Vermont, 1854. 27 Vt. 505.

BENNETT, J. This case comes up upon a general demurrer to the plaintiff's declaration, and, of course, the only question is whether a legal cause of action is set out in the declaration. It may with truth be said, that an attempt to maintain an action upon the facts stated in the declaration is *novel*; but this does not prove *conclusively* that the action cannot be sustained in this age of progress. The facts stated in the declaration are briefly that the plaintiffs, being a banking corporation, had put in circulation a large amount of their bills, and the bills would have had a continued and extended circulation, had it not been for the acts of the defendants, to the great gain and profit of the plaintiffs; and that the Suffolk Bank bought them up from time to time and have refused again to exchange them for other money, and kept them out of circulation; and have called upon and compelled the plaintiffs to redeem the bills in specie.

The declaration charges that the acts of the defendants were performed with *wicked and corrupt motives*, and with an intent to injure, oppress and embarrass the plaintiffs in their business, whereby they have been damnified in their business, harassed, oppressed, and deprived of great gains, as they say, which they otherwise would have made, to wit, ten thousand dollars. It is hardly necessary to say that the plaintiffs issued their bills as a *circulating medium* in lieu of specie currency, and that it was the right of the defendants, in common with others, to purchase in their bills, and thus withdraw them from circulation, until they should choose

ground, constitutes of itself all the malice deemed essential in law to the maintenance of the action," Daniel, J., in *Spengler v. Davy*, 15 Grat. 381 (Va.), and see *accord*: to the effect that the jury may, but are not legally bound to, infer malice from want of probable cause if they find the latter to exist, *Stewart v. Sonneborn*, 98 U. S. 187 (1878); *Vanderbilt v. Mathis*, 5 Duer 304 (N. Y. 1856); *Chicago, R. I. & P. R. Co. v. Holleday*, 30 Okla. 680 (1912); *Pohlman v. Chicago, M. & St. P. R. Co.*, 131 Iowa 89 (1906), and the multitude of cases cited in the American Digest, Cent. Ed., Vol. 33, 1880-1882, Decennial Ed., Vol. 12, Malicious Prosecution, § 32; but see *Sharpe v. Johnston*, 76 Mo. 660 (1882), to the effect that malice cannot be directly inferred from want of probable cause though the former may be inferred from the same circumstances which go to establish the latter. The inference is enough unless explained to carry the case to the jury, *Madison v. P. R. Co.*, 147 Pa. St. 509 (1902), though the court will nonsuit if the evidence produced by the plaintiff itself proves the defendant's lack of malice, *Madison v. P. R. Co.*, 147 Pa. St. 509 (1902). Lack of probable cause may, however, not be inferred from malice, *Johnstone v. Sutton*, and cases cited, *supra*, *Steed v. Knowles*, 79 Ala. 446 (1885), but see *Prough v. Enriken*, 11 Pa. 81 (1849); *MacDonald v. Schroeder*, 214 Pa. St. 411 (1906), holding that where the defendant has instituted criminal proceedings for the purpose not of bringing a supposed criminal to justice, but to force him to pay a debt, whether justly due or not, the burden of proving probable cause is shifted to him, compare *Mayer v. Walter*, 64 Pa. 283 (1870), and *Grainger v. Hill*, 4 Bing. N. C. 212 (1838), and see *Bonney v. King*, 103 Ill. App. 601 (1902).

again to put them in circulation or call upon the plaintiffs to redeem their promise by the payment of their bills in specie.

The defendants are not charged with doing any act in itself considered wrong; but it is attempted to make the acts *actionable* by reason of the bad motive imputed to the defendants in doing them. This case, seems to us, but an ordinary one of a creditor calling upon his debtor for his pay, at a time, and at a place, and in a manner to which the debtor has no right to make objection. It was morally and legally the duty of the plaintiffs at all times to be ready and willing to redeem their bills, and it has operated to their injury to be called upon at any particular time to redeem a particular amount, it is "*damnum absque injuria*." Here was no *unlawful conspiracy* by the defendants with others, either to do a lawful act in an unlawful manner, or an unlawful act to the injury of the plaintiffs; but the declaration charges, in effect, that the acts were done from bad *motives* in the defendants. This, we think, is not enough. *Motive* alone is not enough to render the defendants liable for doing those acts, which they had a right to do. It is too well settled to need authority that *malice* alone will not sustain an action for a *vexatious* suit. There must also be want of probable cause. This principle is enough to settle this case. If the defendants could not be sued for instituting suits *maliciously* to collect pay upon the plaintiff's bills which they lawfully held,¹ much less could they be

¹ *Accord: Buck v. Latham*, 110 Minn. 523 (1910), the defendant in an action on a promissory note alleged by way of counter claim that the plaintiff had bought the note and instituted suit thereon, not for the purpose of serving any interest of his own but for the sole purpose of harassing and oppressing the defendant. These allegations were held to show no cause of action; *O'Brien v. Barry*, 106 Mass. 300 (1871); *Jenkins v. Fowler*, 24 Pa. 308 (1855), *semble*; *Hamilton v. Windolf*, 36 Md. 301 (1852); *Stevenson v. Newnham*, 13 C. B. 285 (1853); *Friel v. Plumer*, 69 N. H. 498 (1898), *semble*. Nor is it a defense to an action of trespass that it was one of a number of civil and criminal actions instituted against the defendant brought to harass him and force him to leave the neighborhood, *Jacobson v. Van Boening*, 48 Nebr. 80 (1896), or to an action to collect a valid debt that the creditor has not selected the least troublesome and expensive process for its collection, *Anthes v. Schroeder*, 74 Nebr. 172 (1905).

So it is not unlawful for a mortgagee to foreclose an overdue mortgage though he deliberately does so at a time when, the debtor being temporarily embarrassed, the insistence on his legal right will ruin the debtor and this whether his purpose is to acquire the property at a price below its value, *Morris v. Tuthill*, 72 N. Y. 575 (1878), or to ruin the creditor without benefit to himself, *Randall v. Hazleton*, 12 Allen 412 (Mass. 1866), p. 415; Madden, C. J., in *Martell v. Victorian Coal Miners' Assn.*, 29 Vict. L. R. 475 (1903), p. 510.

Nor will the motives of the former holder of a mortgage, negotiable instrument or assignable *chose in action* in selling, or of the purchaser in buying, defeat a subsequent action thereon or make the sale or purchase an actionable wrong, *Morris v. Tuthill*, *supra*, *Randall v. Hazleton*, *supra*.

Under the law of France and Quebec, one guilty of abuse of his right to litigate even a well-founded claim may be liable in damages, F. P. Walron, Esq., 22 Harv. L. R. 501, p. 508 and notes 4 and 5.

And see on this point as well as on the right of a landowner to secure his property from unlawful interference or intrusion and for a very valuable discussion of the whole subject, the essay by the late Professor James Barr Ames on "How far an Act may be a Tort because of the Wrongful Motive

sued for simply calling upon the defendants for pay, without the intervention of a suit, though done *with malice*.

The result is, the judgment of the county court is affirmed.

(a) Guilt of person prosecuted and acquitted.

NEWTON v. WEAVER.

Supreme Court of Rhode Island, 1882. 13 Rhode Island, 616.

MATTESON, J. This is an action of the case for malicious prosecution. The prosecution alleged to have been malicious was an action of trover, brought against the plaintiff by the defendant, for the conversion of a quantity of hardware and other materials, sold to the plaintiff by the defendant, to be used in the erection of certain dwelling-houses, which the plaintiff was engaged in building. At the trial of the present action the defendant offered to show, by examination of the plaintiff and another witness, certain facts tending to prove that the plaintiff purchased the goods with the intent not to pay for them, and so was guilty of the conversion of the goods charged against him in the trover suit. The court excluded the testimony and the defendant excepted.

But though inadmissible to establish probable cause, or to rebut the charge of malice, (because not known to the defendant when he brought the suit in trover¹), we think the testimony should have been received. The action for malicious prosecution was designed for the benefit of the innocent and not of the guilty. It matters not whether there was probable cause for the prosecution, or how malicious may have been the motive of the prosecutor, if the accused is guilty he has no legal cause for complaint. The grounds of this action, says Ruffin, C. J. in *Bell v. Pearcey*, 5 Ired. 83, 84, quoting from Buller Nisi Prius, 14, have been said to be "on the plaintiff's side, innocence; on the defendant's, malice." Again, in the same case, page 86, he says: "There is no doubt that a defendant in this action may allege that the plaintiff, though acquitted in the prosecution, was actually guilty, and that he may prove the guilt by any evidence in his power, though discovered after the prosecution began, or after it ended. The law does not give the action to a guilty man. He brings it as an innocent one, and if it appears on the trial in any way that he is not, he must fail." See also, *Johnson v. Chambers*, 10 Ired. 287, 291; *Bacon v. Towne*, 4 Cush. 217, 241; *Barber v. Gould*, 27 N. Y. Supreme Court, 446, 447; *Turner v. Dinnegar*, 27 N. Y. Supreme Court, 465, 466. As the testimony offered tended

of the Actor," 18 Harv. L. R. 411, especially pp. 414-415, and for a somewhat different view "Privilege, Malice and Intent," by Mr. Justice Holmes, 8 Harv. L. R. 1.

¹A part of the opinion is omitted holding that, for this reason, the evidence was inadmissible for these purposes.

to prove that the plaintiff was guilty of the alleged conversion of the goods, and as his guilt, if established, would have barred his right to recover, we think the court erred in rejecting it, and, therefore, sustain the first three exceptions.²

(b) Abuse of process.

MAYER v. WALTER.

Supreme Court of Pennsylvania, 1870. 64 Penna. St. Rep. 283.

SHARSWOOD, J. There is a distinction between a malicious use and a malicious abuse of the legal process. An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it. Thus, if a man is arrested, or his goods seized in order to extort money from him, even though it be to pay a just claim other than that in suit, or to compel him to give up possession of a deed or other thing of value, not the legal object of the process, it is settled that in an action for such malicious abuse it is not necessary to prove that the action in which the process issued has been determined, or to aver that it was sued out without reasonable or probable cause: *Grainger v. Hill*, 4 Bing. N. C. 212. It is evident that when such a wrong has been perpetrated, it is entirely immaterial whether the proceeding itself was baseless or otherwise. We know that the law is good, but only if a man use it lawfully.¹

² Accord: *Whitehurst v. Ward*, 12 Ala. 264 (1847); *Shannon v. Sims*, 146 Ala. 673 (1906); *Whipple v. Gorsuch*, 82 Ala. 252 (1907); *Bruley v. Rose*, 57 Iowa 651 (1882); *Lancaster v. McKay*, 103 Ky. 616 (1898); *Threefoot v. Nuckols*, 68 Miss. 116 (1890); *Morris v. Corson*, 7 Cow. 281 (N. Y. 1827); *Johnson v. Chambers*, 10 Iredell 287 (N. Car. 1849), in all of which the prosecution terminated by the grand jury refusing to indict, the justice of the peace dismissing the complaint, or in some other way, before trial on the merits by a jury or other body having final determination thereof. In *Turner v. Dinnegar*, 20 Hun 465 (N. Y. 1880); *Bell v. Pearcey*, 5 Iredell 83 (N. Car. 1844); *Parkhurst v. Masteller*, 57 Iowa 474 (1881), where the grand jury formed a true bill, and *Mack v. Sharp*, 138 Mich. 448 (1904), the final termination of the prosecution does not appear, though in *Mack v. Sharp*, the plaintiff is said to have been "acquitted," and in *Parkhurst v. Masteller*, the court says that "the defendant may prove, that the defendant, notwithstanding his acquittal, was in fact guilty." The word acquittal is however, appropriate to any termination of the prosecution in favor of the accused and does not involve the idea of a verdict of a jury in his favor. In *Bacon v. Towne*, 4 Cush. 217 (Mass. 1849), Shaw, C. J., says, p. 241, that the plaintiff's actual guilt may be proved in mitigation of the damages and that the facts proving it, though not shown to have been known by the defendant when he instituted the prosecution, are admissible on the question of probable cause, since he may have then known them, though now unable to prove that he did, and see Jervis, C. J., and Pollock, C. B., in *Heslop v. Chapman*, 23 L. J. Q. B. 49 (1853), p. 52.

Contra: *Williams v. Banks*, 1 F. & F. 557 (1859), and see Clerk and Lindsell on Torts, 6th ed., 710.

¹ Accord: *McClenny v. Inverarity*, 80 Kans. 569 (1909), "the warrant" says Benson, J., "was used to extort money and not to bring the alleged offender

On the other hand, legal process, civil or criminal, may be maliciously used so as to give rise to a cause of action where no object is contemplated to be gained by it other than its proper effect and execution. As every man has a legal power to prosecute his claims in a court of law and justice, no matter by what motives of malice he may be actuated in doing so, it is necessary in this class to aver and prove that he has acted not only maliciously, but without reasonable or probable cause. It is clearly settled also, that the proceeding must be determined finally before any action lies for the injury; because, as it is said in *Arundell v. Tregono*, Yelv. 117, the plaintiff will clear himself too soon, viz., before the fact tried, which will be inconvenient; besides, the two determinations might be contrary and inconsistent.

CHAPTER III.

Defamation Excused by the Necessity of Preserving the Right to Speak Freely When Such Freedom is to the Public Interest or Necessary for Protection of the Speaker or Others.

SECTION 1.

Absolute Immunity.

(a) Immunity of judges, witnesses, counsel and parties to actions.

SCOTT v. STANSFIELD.

Court of Exchequer, 1868. L. R. 3 Exch. 220.

The declaration set forth that the plaintiff carried on the business of an accountant and scrivener and that the defendant had spoken of him in relation to his business as such the following words, "You are a harpey preying on the vitals of the poor."

before the magistrate, to break the law not to enforce it"; *White v. Apsley Rubber Co.*, 181 Mass. 339 (1902), 194 Mass. 97 (1907), criminal law "invoked not for the purpose of vindicating justice but to get rid of a troublesome tenant"; *Wood v. Graves*, 144 Mass. 365 (1887), defendant procured an indictment against the plaintiff and caused his arrest and detention thereon until he had settled a debt; in *Prough v. Entriken*, 11 Pa. 81 (1849), it is held that where criminal process is used to collect even a just debt, as may be inferred from the fact that the creditor drops the prosecution after it is paid, "the onus of proving probable cause" is thrown on him if an action of malicious prosecution is brought against him, *Macdonald v. Schroeder*, 214 Pa. St. 411 (1906).

In *Rossiter v. Minnesota Bradner-Smith Paper Co.*, 37 Minn. 296 (1887),

Plea that the defendant was a judge of a court of record, the County Court of Yorkshire, and spoke the words complained of while hearing and trying a cause within his jurisdiction, in which the new plaintiff was defendant.

Replication: That the said words so spoken and published by the defendant as aforesaid, were spoken falsely and maliciously, and without any reasonable, probable or justifiable cause, and without any foundation whatever, and not bona fide in discharge of his duty as judge as aforesaid, and were wholly uncalled for, immaterial, irrelevant, and impertinent, in reference to, or in respect of, the matters before him, and were wholly unwarranted on the said occasion, of all which premises the defendant had notice before and at the time of the committing of the said grievance, and then well knew.

Demurrer and joinder.¹

KELLY, C. B. I am of opinion that our judgment must be for the defendant. The question raised upon this record is whether an action is maintainable against the judge of a county court, which is a court of record, for words spoken by him in his judicial character and in the exercise of his functions as judge in the court over which he presides, where such words would as against an ordinary individual constitute a cause of action, and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him. The question arises perhaps, for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without

the seizure under process of goods, by statute exempt therefrom, is held a malicious abuse of process, compare *Friel v. Plumer*, 69 N. H. 498 (1898), where it is said to be "a trespass, for which the legal process affords no justification." The boundary between the malicious use and the abuse of legal process is by no means sharply defined, and while "abuse implies irregular and improper use, not merely regular and proper use", *Jeffery v. Robbins*, 73 Ill. App. 353 (1897), p. 361, it is not easy to distinguish between the two, compare *Bonney v. King*, 103 Ill. App. 601 (1902), 201 Ill. 47 (1903), with *Wood v. Graves* and *Prough v. Entriken*, *supra*. In *Ilazard v. Harding*, 63 How. Pr. 326 (N. Y. 1882), the malicious unwarranted procuring of ancillary process, such as an attachment or arrest on a statutory *capias* in debt, is treated as abuse of process; but see *Pittsburgh etc. R. Co. v. Wakefield Hardware Co.*, 138 N. Car. 174 (1905), and *Tamblyn v. Johnston*, 126 Fed. 267 (1903), and cases cited therein; and see *Malone v. Belcher*, 103 N. E. 637 (Mass. 1914), where the defendant, who, for the purpose of preventing the sale of the plaintiff's real estate, had levied an attachment thereon in a suit to collect commissions alleged to be due, was held guilty of malicious abuse of process.

¹ The declaration and plea are abridged.

favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily or hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him? Again, if a question arose as to the bona fides of the judge it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus if we were to hold that an action is maintainable against a judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his court submitted to their determination. It is impossible to overestimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can, under any circumstances, be maintainable.

CHANNELL, B.² I am of the same opinion. If the facts alleged by the replication were true, no doubt there would be misconduct on the part of the defendant. It does not follow from the decision which we now pronounce, that a county court judge can so misconduct himself with impunity. If a county court judge be guilty of misconduct in the exercise of his office, the Lord Chancellor may, if he think it expedient, remove him from such office, but no action will, in my opinion, lie against him for anything done by him in his judicial capacity. For the benefit of the public and the due administration of justice, the law provides that a judge is to be so far free and unfettered in the exercise of his office as not to be liable to an action for what he does in the capacity of judge, and so placed under restraint in the discharge of his duty.

Judgment for the defendant.

DAWKINS v. LORD ROKEBY.

House of Lords, 1875. L. R. 7 English & Irish Appeals 744.

THE LORD CHIEF BARON (Sir F. Kelly), in the name of the consulted Judges, gave the following answer to the question proposed:—

My Lords, these of Her Majesty's Judges who have had the honour of attending your Lordships during the argument of this case, are unanimously of opinion that the question put to them by your Lordships must be answered in the affirmative.

A long series of decisions has settled that no action will lie

²The concurring opinions of Martin and Bramwell, B., are omitted.

against a witness for what he says or writes in giving evidence before a Court of Justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this ground. But the principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice.¹ The authorities, as regards witnesses in the ordinary Courts of Justice, are numerous and uniform. In the present case, it appears in the bill of exceptions that the words and writing complained of were published by the defendant, a military man, bound to appear and give testimony before a Court of Inquiry. All that he said and wrote had reference to that inquiry; and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary Court of Justice.

THE LORD CHANCELLOR (Lord Cairns):—

Now, my Lords, adopting expressions of the learned Judges with regards to what I take to be the settled law as to the protection of witnesses in judicial proceedings, I certainly am of opinion that upon all principles, and certainly upon all considerations of convenience and of public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath ought to be extended, and must be extended, to a military man who is called before a Court of Inquiry of this kind for the purpose of testifying there upon a matter of military discipline connected with the army.² It is not denied that the statements which

¹ See Pigot, C. B., in *Kennedy v. Hilliard*, 10 Ir. C. L. Rep. 195 (1876), p. 209, "I take it that this is a rule of law not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded upon public policy, which requires a Judge, in dealing with a matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a Court of Justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. It is of far less importance that occasional mischief should be done by slander under such circumstances, than that the whole course of Justice should be enfeebled and impeded."

So in the early case of *Cutler v. Dixon*, 4 Coke 14 (1584), it was held that no action lay upon any matter contained in pleadings, affidavits or petitions of persons pursuing the ordinary course of Justice, for otherwise "those who have just cause of complaint would not dare to complain for fear of infinite vexation." The immunity of counsel for their statements while pleading a client's cause is said by Brett, M. R. in *Munster v. Lamb*, L. R. 11 Q. B. Div. 588 (1883), p. 604, to be necessary as otherwise "he would have his mind so embarrassed that he could not do the duty he has to perform. * * * If the rule were otherwise the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making so large counsel are included who have been guilty of malice and misconduct."

² *Goffin v. Donnelly*, L. R. 6 Q. B. Div. 307 (1881), witness before select committees (of inquiry) of House of Commons; *Wright v. Lothrop*, post; *Sheppard v. Bryant*, 191 Mass. 591 (1906), witnesses before legislative investigating committees; but see *Blakeslee v. Carroll*, 64 Conn. 223 (1894),

he made, both those which were made *vivâ voce* and those which were made in writing, were relative to that inquiry.

Under those circumstances, my Lords, I submit to your Lordships that the conclusion of the learned Judges is in all respects one which we ought to adopt, and that your Lordships will hold that statements made under these particular circumstances are statements which cannot become the foundation of an action at law. I therefore move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and this appeal dismissed with costs.

LORD PENZANCE:—

My Lords, I also agree in the view that has been stated, but I wish to say one word on the supposed hardship of the law which is brought into question by this appeal.

It is said that a statement of fact of a libellous nature which is palpably untrue—known to be untrue by him who made it, and dictated by malice—ought to be the subject of a civil remedy, though made in the course of a purely military inquiry. This mode of stating the question assumes the untruth and assumes the malice. If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man.

But this is not the state of things under which this question of law has to be determined. Whether the statements were, in fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is, whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet in the eyes of a jury be open to that im-

holding the proceedings of an investigating committee of the whole of a board of aldermen not to be judicial or quasi-judicial and the privilege of a witness before them to be conditional only. An administrative council, to whom had been transferred part of the administrative functions previously exercised by the courts, does not in the exercise of such function act as a judicial tribunal, *Royal Aquarium Society v. Parkinson*, L. R. 1892 1 Q. B. 431.

There are many *dicta* to the effect that the immunity only attaches to proceedings in a court having jurisdiction, *Buckley v. Wood*, 4 Coke 14a (1590), *Hoar v. Wood*, 3 Metc. 193 (Mass. 1841), *Johnson v. Brown*, 13 W. Va. 71 (1878), p. 133, pleadings of parties to the proceedings and cases cited 9 Col. L. R. 602, n. 4; *Contra, Lake v. King*, 1 Mod. 58 (1670); *Gwinne v. Poole*, 2 Lutw. 1560 (1692); *Runge v. Franklin*, 72 Tex. 585 (1889). In Bower on "Actionable Defamation", p. 371, the law of England is said to be that "it is different if the proceeding, so far as the party defaming has any reason to know, is lawful and conducted with apparent regularity"; see also, *McCabe v. Joynt*, 1901 2 Ir. R. 115. In *Perkins v. Mitchell*, 31 Barb. 461 (N. Y. 1860), a distinction is made between a witness, subpoenaed to testify or required to make an affidavit, who is not required to know if the court has jurisdiction, and one, who voluntarily appears in a form of proceeding not known to the common law, who must see that jurisdiction is acquired before he can claim immunity.

putation; or, again, the witness may be cleared by the jury of the imputation, and may yet have to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands.

These considerations have long since led to the legal doctrine that a witness in the Courts of Law is free from any action; and I fail to perceive any reason why the same considerations should not be applied to an inquiry such as the present, and with the same result.

SEAMAN v. NETHERCLIFT.

In the Court of Appeal, 1876. L. R. 2 C. P. Div. 53.

Appeal from the decision of the Common Pleas Division, ordering judgment to be entered for the defendant, 1 C. P. D. 540.

Claim: that defendant said of a will, to the signature of which the plaintiff was a witness, "I believe the signature of the will to be a rank forgery, and I shall believe so till the day of my death," meaning that the plaintiff had been guilty of forging the signature of the testator, or of aiding and abetting in the forgery.

Defence: that defendant spoke the words in the course of giving his evidence as a witness on a charge of forgery before a magistrate.

Reply: that the words were not bona fide spoken by defendant as a witness, or in answer to any question put to him as a witness, and he was a mere volunteer in speaking them for his own purposes otherwise than as a witness and maliciously and out of the course of his examination.

COCKBURN, C. J. The case is, to my mind, so abundantly clear, and I believe to the minds of my learned Brothers, that I think we ought not to hesitate to at once pronounce our decision.

At the trial before Lord Coleridge it appeared that in the Probate suit of *Davies v. May* the defendant had been examined, as an adept, to express his opinion as to the genuineness of a signature to a will, and he gave it as his opinion that the signature was a forgery. The president of the Court, in addressing the jury, made some very strong observations on the rashness of the defendant in expressing so confident an opinion in the face of the direct evidence. Soon afterwards, on a prosecution for forgery before the magistrate, the defendant was called as an adept by the person charged, when he expressed an opinion favourable to the genuineness of the document. He was then asked by the counsel for the prosecution whether he had been a witness in the suit of *Davies v. May*. He answered "Yes." And he was then asked, "Did you repeat a report of the observations which the presiding judge made on your evidence?" He again said "Yes." And then the counsel stopped. I presume the circumstances of the trial were well known, and the counsel thought he had done enough. The defendant, the witness,

expressed a desire to make a statement. The magistrate told him he could not hear it. Nevertheless the defendant persisted and made the statement, the subject-matter of this action of slander.

On the proof of these facts Lord Coleridge reserved leave to the defendant to move to enter judgment, if the Court should be of opinion that there was no evidence on behalf of the plaintiff which ought to be left to the jury. It occurred to him, however, that it would be as well to take the opinion of the jury, and they found that the replication was true, viz. that the words were spoken not as a witness in the course of the inquiry, but maliciously for his own purpose, that is, with intent to injure the plaintiff. Upon these findings judgment was entered for the plaintiff, leave being again reserved to enter judgment for the defendant, and the Court of Common Pleas gave judgment for the defendant.

Now, if the findings of the jury have been founded upon evidence upon which they could have been supported, I might have had some hesitation about the decision. But they were not; and we are asked to come to a conclusion contrary to what has been established law for nearly three centuries.

If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and the questions might be, and are, constantly asked which are not strictly relevant to the issue.¹ But that, beyond all question, this unqualified privilege extends to a witness is established by a long series of cases, the last of which is *Dawkins v. Lord Rokeby*, Law Rep. 7 H. L. 744, after which to contend to the contrary is hopeless. It was there

¹ The tendency of British decision is to hold that the immunity does not depend on the relevancy of the statements made in answer to question or volunteered by a witness while testifying, *Munster v. Lamb*, L. R. 11 Q. B. Div. 588 (1883), *semble*, p. 601; *Kennedy v. Hilliard*, 10 Ir. C. L. Rep. 195 (1859), *semble*, p. 211, or made orally or in pleadings, affidavits or petitions by parties to litigation, *Kennedy v. Hilliard*, 10 Ir. C. L. Rep. 195 (1859); *Hodson v. Pace*, L. R. 1899, 1 Q. B. 455; or by counsel in the trial of his client's cause, *Munster v. Lamb*, L. R. 11 Q. B. Div. 588 (1883). Some of the earlier cases seem to give protection to a witness only if he testified on the matter or point in issue, so that if his testimony is false, he was guilty of perjury under the statute 5 Eliz. c. 9 § 6, *Eyres v. Sedgewicke*, Palm. 142 (1620), Cro. Jac. 601, or to counsel only if he "give in evidence" anything not material to the issue, since "he is to discern at his peril what to deliver" and is under no duty to his client to deliver "matter not pertinent to the issue or the matter in question."

The following American cases adopt or contain *dicta* approving the doctrine of the later English cases, *Hunkel v. Voneiff*, 69 Md. 179 (1888), witness, (as to the immunity extended in that state to pleadings and counsel, see Note 4 to *Wright v. Lothrop*, *post*;) *Sebree v. Thompson*, 126 Ky. 223 (1907), *semble*; *Chambliss v. Blau*, 127 Ala. 86 (1899), *semble*; *Terry v. Fellows*, 21 La. Ann. 375 (1869), *semble*, also witnesses; *Runge v. Franklin*, 72 Tex. 585 (1889), pleadings of party.

The immunity is not confined to statements defamatory of parties to the litigation, *Henderson v. Broomhead*, 4 H. & N. 569 (1859), *Crockett v. McLenahan*, 109 Tenn. 517 (1902); *Cooley v. Galyon*, 109 Tenn. 1 (1909).

expressly decided that the evidence of a witness with reference to the inquiry is privileged, notwithstanding it may be malicious; and to ask us to decide to the contrary is to ask what is beyond our power. But I agree that if this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not while he was giving evidence in the case, the result might have been different. For I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say *dehors* the matter in hand, is necessarily protected. I quite agree that what he says before he enters or after he has left the witness-box is not privileged, which was the question in the case before Lord Ellenborough, *Trotman v. Dunn*, 4 Camp. 211.² Or if a man when in the witness-box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked: Were you at York on a certain day? and he were to answer: Yes, and A.B. picked my pocket there; it certainly might well be said in such a case that the statement was altogether *dehors* the character of witness, and not within the privilege.

If, therefore, the findings of the jury, that the defendant had ceased to be a witness when he spoke the words, were justified by the evidence, I should hesitate before I decided in his favour. But I think the defendant was entitled to judgment on the first reservation. There was no evidence to go to the jury upon the plaintiff's case. What the defendant said was said in his character of witness; for there can be no doubt that the words were spoken in consequence of the question put to him by counsel for the prosecution, the object and effect of the cross-examination having been to damage his credibility as a witness before the magistrate, and of this the witness was conscious. The counsel, having put the question, stops; and if there had been counsel present for the prisoner who had re-examined the witness, he would have put the proper questions to rehabilitate him to the degree of credit to which he was entitled. That such questions would have been relevant I cannot bring myself for a moment to doubt, relating as they do to the credibility of the witness, which is part of the matter of which the magistrate has to take cognizance. That being so, the witness himself, who is sworn to speak the whole truth, is properly entitled, not only with a view to his own vindication, but in the interest of justice, to make such an observation in explanation of his former answer as is just and fair under the circumstances. That is what the defendant did. The sitting magistrate having allowed the disparaging question to

² *Accord: Morgan v. Booth*, 76 Ky. 480. A witness testifying before a grand jury has absolute immunity, *Schultz v. Strauss*, 127 Wis. 325 (1906), and statements made to the district attorney, whether after a bill of indictment has been preferred, *Schultz v. Strauss*, 127 Wis. 325 (1906), or giving information to enable him to begin a prosecution, *Vogel v. Gruaz*, 110 U. S. 311 (1883), are absolutely privileged, and so are statements made to or by an attorney in the preparation of his client's case, *Watson v. Jones*, 1905 A. C. 380; *Youmans v. Smith*, 153 N. Y. 214 (1897).

be put and answered, ought not to have interfered to prevent the defendant from giving an explanation. I think the statement, coming immediately after the damaging question had been put to him, must be taken to be part of his testimony touching the matter in question, as it affects his credibility as a witness in the matter as to which he was called. It was given as part of his evidence before he had become divested of his character of witness; and but for the question of the opposite counsel he never would have made the statement at all.

In my opinion, the Lord Chief Justice should have nonsuited the plaintiff, which is the conclusion at which the Court of Common Pleas ultimately arrived; for there really was no evidence that the defendant was speaking otherwise than as a witness and relevantly to the matters in issue, because relevantly to his own character and credibility as a witness in the matter. That being so, even if express malice could have been properly inferred from the circumstances, the case of *Dawkins v. Lord Rokeby*, Law. Rep. 7 H. L. 744, conclusively decides that malice has ceased to be an element in the consideration of such cases, unless it can be shewn that the statement was made not in the course of giving evidence, and therefore not in the character of a witness.

BRAMWELL, J. A. I am of the same opinion. The judgment of the Common Pleas affirmed two propositions. First, that what the defendant said was said as a witness, and was relevant to the inquiry before the magistrate; secondly, that, that being so, the Lord Chief Justice should have stopped the trial of the action by nonsuiting the plaintiff.

As to the first proposition, I am by no means sure that the word "relevant" is the best word that could be used; the phrases used by the Lord Chief Baron and the Lord Chancellor in *Dawkins v. Lord Rokeby*, Law Rep. 7 H. L. at p. 744, would seem preferable, "having reference," or "made with reference to the inquiry." Now, were the judges of the Common Pleas Division right in holding that this statement of the defendant had reference to the inquiry? I think that they were. There can be no doubt that the question put by the cross-examining counsel ought not to have been allowed: "Have you read what Sir James Hannen is reported to have said as to your evidence in *Davies v. May*?" What Sir James Hannen had said in a former case was not evidence. It was, therefore, an improper question, and the answer to it, if untrue, would not have subjected the witness to an indictment for perjury. But the question having been put, and the answer having been in the affirmative—and the question being, as Lord Coleridge observed, "ingeniously suggestive," viz.: that the way the defendant had been dealt with on the former occasion did not redound to his credit as a witness—the defendant insisted on making in addition the statement complained of. He did so, in my opinion, very foolishly. It would have been better to have been satisfied with retaining his own opinion without setting it up in direct opposition to the positive testimony of eyewitnesses. But he foolishly, as I think, and coarsely ex-

claimed, "I believe the will to be a rank forgery, and shall believe so to the day of my death." Suppose after he had said "yes," he had added in a decent and becoming manner, "and I am sorry Sir James Hannen said what he did, for I took great pains to form my own opinion, and I shall always retain it, as I still think it right." Would not that have had reference to the inquiry before the magistrate? And would it not have been reasonable and right that the witness should have added that statement in justification of himself? Surely, yes. Mr. Clarke said he was prepared to maintain that as long as a witness spoke as a witness in the witness-box, he was protected, whether the matter had reference to the inquiry or not. I am reluctant to affirm so extreme a proposition. Suppose while the witness was in the box, a man were to come in at the door, and the witness were to exclaim, "that man picked my pocket." I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness-box, wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything a witness said as a witness should be protected, than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I should certainly pause before I affirmed so extreme a proposition, but without affirming that, I think the words "having reference to the inquiry" ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the judge would give ground for a new trial; but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness. Taking that view, I think the first proposition is established, that the statement of the defendant was made as witness and had reference to the inquiry.

WRIGHT v. LOTHROP.

Supreme Judicial Court of Massachusetts, 1889. 149 Mass. 385.

FIELD, J. It appeared that an order had been introduced, at the suggestion of Lothrop, in the House of Representatives of the Commonwealth, "That the Committee on Insurance consider the expediency of such legislation as will make 'tenants at will' liable for damages from fire caused by their carelessness;" that this order had been ultimately referred to the Committee on the Judiciary; and that after the order was referred to this committee, Lothrop appeared before the committee and called its attention to the report of the case of *Lothrop v. Thayer*, in 138 Mass. 466, which had then been published, and was the report of the decision by this court of the action he had brought against Thayer and Wright for the burning of his property. Lothrop desired the committee to report a bill making tenants at will liable for the negligent burning of prop-

erty in their possession, and, while advocating this before the committee, he explained the action which he had brought and the decision of the court, and said to different members of the committee that the tenants, meaning the plaintiffs, had wilfully burned his building, or that he thought they had, although he could not prove it. There is some evidence that he said this without having been specifically asked a question upon this subject by the committee, and that the committee room was open to the public at the time.

The second of these actions is an action of tort, brought by Wright against Lothrop, for slander, in making the statement concerning the burning of his property which has been recited. The answer sets up, among other things, that the statement was a privileged communication made to a committee of the Legislature upon a subject then under consideration by the committee, and concerning which the committee had a duty to perform, and that the statement was made without malice and under the belief that it was true, and that this was a reasonable belief. The privilege of a witness appearing before a committee of the Legislature, in a matter within the jurisdiction of the committee, is undoubtedly the same as that of a witness in proceedings before a court of justice.¹

The examination of witnesses is regulated by the tribunal before which they testify, and if witnesses answer pertinently questions asked them by counsel which are not excluded by the tribunal, or answer pertinently questions asked them by the tribunal, they ought to be absolutely protected.² It is not the duty of a witness to decide for himself whether the questions asked him under the direction of the tribunal are relevant.³ As the witness is sworn to

¹ See cases cited in note 2 to *Dawkins v. Rokeby*, ante, p. 1040.

² Statements responsive to questions put by counsel or court are generally held to be absolutely privileged, *Hendrix v. Daughtry*, 3 Ga. App. 481 (1908); *Buschbaum v. Heriot*, 5 Ga. App. 521 (1909); *Baldwin v. Hutchinson*, 8 Ind. App. 454 (1893); *Brooks v. Briggs*, 32 Maine 447 (1851); *Cooley v. Galyon*, 109 Tenn. 1 (1902), with which compare *Shadden v. McElwell*, 86 Tenn. 146 (1887). In *Smith v. Howard*, 28 Iowa 51 (1869), it is said that if a witness "in answer to questions, put by attorneys, spoke the words, without malice, believing them to be responsive, he would not be liable"; see *Hutchinson v. Lewis*, 75 Ind. 55 (1881); while in *Acre v. Starkweather*, 118 Mich. 214 (1898), reasonable belief that they were responsive is held to be enough to give immunity. In *Steinecke v. Marx*, 10 Mo. App. 580 (1881), the question is said to be "not as to the pertinency and relevancy of the testimony but whether they were spoken by the witness without being stopped by the court or counsel, and under the supposition that they were relevant." So where a witness is asked to tell his story in his own way it is held in *Sheppard v. Bryant*, 191 Mass. 591 (1906), that he has the right to assume that the court will stop him if he states anything not desired by it and that anything said before such interruption is responsive to the original question.

³ Compare Cockburn, C. J., in *Seaman v. Netherclift*, L. R. 2 C. P. Div. 53 (1876), p. 56.

Accord: *Moore v. Manufacturers' Nat. Bank*, 123 N. Y. 420 (1890), p. 426, *semble*, Bond, J., in *Lamberson v. Long*, 66 Mo. App. 253 (1906), and *Creelius v. Bierman*, 59 Mo. App. 513 (1894); *Buschbaum v. Heriot*, 5 Ga. App. 521 (1909), witness held not to be protected if he volunteer false testimony, "the immateriality of which is apparent to any ordinary mind." In other cases it is said that it is enough if he in good faith believes his statements to be material, *White v. Carroll*, 42 N. Y. 161 (1870); *Marsh v. Elliott*,

tell the whole truth relating to the matter concerning which his testimony is taken, he ought also to be absolutely protected in testifying to any matter which is relevant to the inquiry, or which he reasonably believes to be relevant to it. But a witness ought not to be permitted with impunity to volunteer defamatory statements which are irrelevant to the matter of inquiry, and which he does not believe to be relevant. This statement of the law, we think, is supported by the decisions in this Commonwealth. The English decisions, perhaps, go somewhat further than this in favor of a witness; certainly they apply the rule liberally for his protection. *Marsh v. Ellsworth*, 50 N. Y. 309.

If, then, the statement of Lothrop to the committee be regarded as the pertinent answer of a witness to questions put to him by members of the committee, the action cannot be maintained. Lothrop may have been treated as a witness by the committee, although he was not sworn.⁴

50 N. Y. 309 (1872), p. 313; *Shadden v. McElwee*, 86 Tenn. 146 (1887). See also, *Hastings v. Lusk*, 22 Wend. 410 (N. Y. 1839), p. 421, discussing the immunity of counsel or a party conducting the litigation himself. In *Cooper v. Phipps*, 24 Ore. 357 (1893), it is said that some cases hold that the witness is not protected if it is proved that he abused his privilege by false statements which he knew to be impertinent and immaterial. See also, *Liles v. Gaster*, 42 Ohio St. 631 (1885), which seems to leave open the question whether the witnesses privilege is absolute or conditional. *McDavitt v. Boyer*, 169 Ill. 475 (1897); *McNabb v. Neal*, 88 Ill. App. 571 (1900).

⁴ A similar relevancy is required of statements in pleadings or affidavits or made by counsel in the conduct of his client's cause, *Johnson v. Brown*, 13 W. Va. 71 (1878), *Kemper v. Fort*, 219 Pa. 85 (1907), *Garr v. Selden*, 4 N. Y. 91 (1850), *Jones v. Brownlee*, 161 Mo. 258 (1901), *Crockett v. McLanahan*, 109 Tenn. 517 (1902); pleadings and affidavits; *Hoar v. Wood*, 3 Metc. 193 (Mass. 1841), *McMillan v. Birch*, 1 Binney 178 (Pa. 1806), "if," said Tilghman, C. J., "any man should abuse the privilege and under pretence of pleading his cause, wander designedly from the point in question and maliciously heap slander on his adversary, I will not say that he is not responsible in an action at law;" *Hastings v. Lusk*, 22 Wend. 410 (N. Y. 1839). And see for full citation of American decisions Van Vechten Veeder, Absolute Immunity in Defamation, 9 Col. L. R. 463-600 (1909), note 12, p. 605. Compare the three Maryland cases, decided in the same term dealing respectively with the immunity of witness, party making defamatory statements in his pleadings and counsel, *Hunckel v. Voneiff*, 69 Md. 179 (1888); *Bartlett v. Christhilf*, 69 Md. 219, and *Maulsby v. Reifsnider*, 69 Md. 143.

The burden of proving that the statement of the witness is irrelevant rests on the plaintiff, *Emerman v. Bruder*, 7 Ohio Dec. 311 (1897); Bond, J., in *Creelius v. Bierman*, 59 Mo. App. 513 (1894), and see *Kennedy v. Hilliard*, 10 Ir. C. L. R. 195 (1859), pp. 210, 226, *Kemper v. Fort*, 219 Pa. 85 (1907), cases where the question was the immunity of parties to an action for defamatory statements in the pleadings, holding that all doubt should be resolved in favor of relevancy.

The question of the actual relevancy of the statements is for the court, *Johnson v. Brown*, 13 W. Va. 71 (1878), p. 146; *Jones v. Brownlee*, 161 Mo. 258 (1901); *Crockett v. McLanahan*, 109 Tenn. 517 (1902), while the question of the witnesses belief in their relevancy is, where it is regarded as material, a question for the jury, *Marsh v. Ellsworth*, 50 N. Y. 309 (1872), *Hastings v. Lusk*, 22 Wend. 410 (N. Y. 1839).

In some jurisdictions statements not actually relevant, *Kelley v. Gt. Western R. Co.*, 145 N. W. 664 (Wis. 1914), or not responsive to questions of counsel and clearly irrelevant to any ordinary mind, *Bushbaum v. Heriot*,

(b) Immunity of legislators and governmental officers.

"Freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any Court or place."¹
 —1 *William and Mary Sess.* 11, c. 2, § 1.

COFFIN v. COFFIN.

Supreme Judicial Court of Massachusetts, 1808. 4 Mass. 1.

PARSONS, C. J. The plaintiff has commenced an action on the case, demanding damages of the defendant for an injury to his character, committed by the defendant, in maliciously uttering and publishing defamatory words, which imported that the plaintiff had committed a felony by robbing the Nantucket Bank.

To this demand the defendant pleaded not guilty, and also, by leave of the Court, a special plea in bar, justifying the speaking of the words, because, he alleged, at the time when they were spoken, he and Benjamin Russell were members of the House of Representatives, then in session, and that he spoke the words to Russell, in deliberation in the House, concerning the appointment of a notary public, and that the words had relation to the subject of their deliberation.

The plaintiff, in his replication, denies these allegations; and avers that the words were spoken by the defendant of his own wrong, and without such cause as he had alleged, and tenders an issue to the country. The defendant does not demur to the replication, but joins the issue thus tendered.

Both the issues came on to trial, and it appeared from the evidence, that when the words were spoken, the defendant and Russell were members of the House of Representatives, then in session. The occasion, manner and circumstances, of speaking them are thus related by Russell, the witness. He, having some acquaintance with the plaintiff, and thinking highly of his integrity, was applied to by him to move a resolution for the appointment of an addi-

5 Ga. App. 521 (1909), while losing their absolute immunity are conditionally privileged, the witness's belief or lack of belief being evidence of malice, compare *Smith v. Howard*, 28 Iowa 51 (1869), and see the opinions of Rombauer, P. J., in *Lamberson v. Long* and *Crecelius v. Bierman*, 59 Mo. App. 513 (1894).

¹ This section of the "bill of rights" while held to give absolute immunity to defamatory statements about an individual made in a speech in Parliament, *Dillon v. Balfour*, 20 L. R. Ir. 600 (1887), and while said to be "declaratory, not enacting", *Fielding v. Thomas*, L. R. 1896 A. C. 600, p. 612, was originally designed to protect Parliament and its members from coercion by the crown. For the history of the long struggle for Parliamentary freedom of speech, see Van Vechten Veeder, Esq., *Absolute Immunity in Defamation*, 10 Col. L. Rev. 131 (1910), pp. 131-134, and *Dillon v. Balfour*, 20 L. R. 600 (1887). Similar provisions occur in the constitutions of practically all countries which have constitutions, see 10 Col. L. R. 131, n. 1.

tional notary for Nantucket, the town represented by the defendant. Russell made the motion, and had leave to lay the resolution on the table. The defendant, in his place, inquired where Russell had the information of the facts on which the resolution was moved. The witness answered, from a respectable gentleman from Nantucket. The resolution then passed, and the speaker took up some other business. Russell then left his place, and was standing in the passage-way, within the room, conversing with several gentlemen. The defendant, leaving his place, came over to Russell, and asked him who was the respectable gentleman, from whom he had received the information he had communicated to the house. Russell answered carelessly, he was perhaps one of his relations, and named Coffin, as most of the Nantucket people were of that name. The witness, then, perceiving the plaintiff sitting behind the bar, pointed to him, and informed the defendant he was the man. The defendant looked towards him, and said, "What, that convict?" Russell surprised at the question, asked the defendant what he meant; he replied, "Don't thee know the business of Nantucket Bank?" Witness said, "Yes, but he was honorably acquitted." The defendant then said, "That did not make him less guilty thee knows." It further appears that this conversation passed a little before one o'clock, that the election of notaries was not then before the house, but was made that afternoon, or the next day, and that the plaintiff was not a candidate for that office. And there is no evidence that the resolution laid on the table by Russell, and passed, or the subject-matter of it, was ever after called up in the house.

The defendant insisted the evidence supported the justification contained in the bar, and that by law the second issue ought to be found for him.

The judge gave to the jury his construction of the article, and declared to them his opinion, that the facts did not in law maintain the issue for the defendant; and the jury found a verdict for the plaintiff.

The twenty-first article of the declaration of rights declares that "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."

In considering this article, it appears to me that the privilege secured by it is not so much the privilege of the house, as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature.

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prose-

cutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in a debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber.

He cannot be exercising the functions of his office as member of a body, unless the body be in existence. The house must be in session, to enable him to claim this privilege; and it is in session, notwithstanding the occasional adjournments, for short intervals, for the convenience of its members. If a member, therefore, be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. The body of which he is a member, is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from the civil or criminal prosecutions for every thing said or done by him in the exercise of his functions, as a representative, in committee, either in debating, in assenting to, or in draughting a report. Neither can I deny the member his privilege, when executing the duties of his office, in a convention of both houses, although the convention should be holden in the senate chamber.

To this construction of the article it is objected, that a private citizen may have his character basely defamed, without any pecuniary recompense or satisfaction. The truth of the objection is admitted. But he may have other compensation awarded to him by the house, who have power, as a necessary incident, to demand of any of its members a retraction, or apology, of or for any thing he has said, while discharging the duties of his office, either in the house, in committee, or in a convention of the two houses, on pain of expulsion. But if it allowed that the remedy is inadequate, then a private benefit must submit to the public good. The injury to the reputation of a private citizen is of less importance to the commonwealth, than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions.

If this very liberal construction of the twenty-first article be just; if it be warranted by its language; if it be consonant to its manifest intent and design,—the question before the court lies in a narrow compass.

Was Coffin, the defendant, in speaking the defamatory words, executing the duties of his office? Or, in other language, was he

acting as a representative? If he was, he is entitled to the privilege he claims; if he was not, but was acting as a private citizen, as a private citizen he must answer.

Upon information given by the plaintiff to Russell, a member, he had moved a resolution providing for the choice of another notary for Nantucket; and on Russell's stating that his information was from a respectable person from that place, the resolution had passed; the house had proceeded to other business; and the subject-matter of the resolution, or of the information, was not in fact before the house, although it is certain that any member might have moved to rescind the resolution. Russell, his brother member, was in the passage-way, conversing with several gentlemen: the defendant came to him, and inquired the name of Russell's informant, who, he had declared, was a respectable gentleman from Nantucket. Was this inquiry, thus made, the act of a representative, discharging his duty, or of a private citizen, to gratify his curiosity? It was the former, says the defendant's counsel. Whether it was or not, certainly it was innocent. But to pursue the evidence; the defendant was answered; whatever was his motive, he had received the information. If, upon it, he intended again to call up the resolution, he might have done it. But no motion for that purpose was ever made. He then utters to Russell the defamatory words. What part of his legislative duty was he now performing? It is said that he might apprehend that the plaintiff was a candidate for the office of notary, and that his motive might be to dissuade Russell from giving his vote. But there is no evidence that the defendant supposed the plaintiff to be a candidate, and it is in evidence that the plaintiff was not a candidate. It is also apparent that the defendant believed that Russell was not ignorant of the indictment against the plaintiff, and of his acquittal. I cannot, therefore, assign to the defendant any other motive for his indiscreet language, but to correct Russell for giving to the plaintiff the appellation of a respectable gentleman, and to justify the correction by asserting that an honorable acquittal, by the verdict of a jury, is not evidence of innocence. It is not, therefore, possible for me to presume that the defendant, in using thus publicly the defamatory words, even contemplated that he was in the discharge of any official duty. This inquiry by the defendant, and his replies, might have been made, for all the purposes intended by him, in State Street, or in any other place, as well as the representatives' chamber; and it is not easy for me to conceive that any language or conduct of a representative must be considered as official, merely because he chooses the representatives' chamber for the scene.

But in actions for defamatory words against a member, he may, in cases to which his privilege does not extend, defend himself like any other citizen, by proving that the words were spoken for a justifiable purpose, not maliciously, nor with a design to defame the character of any man. And this defence will avail every man charged with slander, although it may be that the words uttered are

not true. I do not, therefore, consider any citizen, who is a representative, answerable in a prosecution for defamation, where the words charged were uttered in the execution of his official duty, although they were spoken maliciously; or where they were not uttered in the execution of his official duty, if they were not spoken maliciously, with an intent to defame the character of any person. And I do not consider a representative holden to answer for defamatory words, spoken maliciously, and not in discharging the functions of his office. But to consider every malicious slander, uttered by a citizen, who is a representative, as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privilege farther than was intended by the people, or than is consistent with sound policy, and would render the representatives' chamber a sanctuary for calumny—an effect which never has been, and, I confidently trust, never will be, endured by any House of Representatives of Massachusetts.

I am convinced, after much consideration, that the facts presented by the case do not entitle the defendant to the privilege which he claims; and that, for this cause, the verdict ought not to be set aside.

Under this impression, to give a different opinion would be a desertion of a solemn duty, and a gross prevarication with my own conscience.

In this opinion the Chief Justice, the other judges, viz., Sedgwick, Sewall, Thatcher, and Parker, severally declare their full and entire concurrence.¹

CHATTERTON *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

Court of Appeal, 1895. *L. R.* 1895, 2 *Q. B.* 189.

LORD ESHER, M. R. The plaintiff in this case has brought an action of libel against the Secretary of State for India in Council. It would seem from the form of the action that it is meant to be brought against him in his official capacity, treating him as a cor-

¹ *Accord*: *Kilbourn v. Thompson*, 103 U. S. 168 (1880), and this though the proceedings, an investigation of the matter then pending in the courts, was beyond the powers of Congress. It is held in *Greenwood v. Cobbe*, 26 Nebr. 449 (1889), that the privilege of members of boards or bodies exercising local legislative functions and of executive officers making official communications to them is conditional merely, *Weber v. Lane*, 99 Mo. App. 69 (1903), report of a committee of board of aldermen held privileged unless inspired by "actual malice"; *contra*, *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426 (1893), libellous resolution offered in a city council, and *Trebilcock v. Anderson*, 117 Mich. 39 (1898), libellous statements in a mayor's message to a city council explaining his veto of a resolution passed by it. The privilege of citizens taking part in the proceedings of "town meetings" is clearly conditional and not absolute, *Bradley v. Heath*, 12 Pick. 163 (Mass. 1831); *Henry v. Moberly*, 6 Ind. App. 490 (1892); *Bradford v. Clark*, 90 Maine 298 (1897). In *Burch v. Bernard*, 107 Minn. 210 (1909), *Callahan v. Ingram*, 122 Mo. 355 (1894), *Mauk v. Brundage*, 68 Ohio St. 89 (1903), and *McGaw*

poration, not against him personally. But it would have made no difference if it had been brought against him as an individual. The substance of the case is that it is an action brought against him in respect of a communication in writing made by him as Secretary of State, and, therefore, a high official of the state, to an Under-Secretary of State in the course of the performance of his official duty. The master, the judge at chambers, and the Divisional Court have all come to the conclusion that the action is one which cannot by any possibility be maintained; that it is not competent to a civil court to entertain a suit in respect of the action of an official of state in making such a communication to another official in the course of his official duty, or to inquire whether or not he acted maliciously in making it. I think that conclusion was correct. The authorities which have been cited to us appear to shew that, as a matter of clear law, a judge at the trial would be bound to refuse to allow such an inquiry to proceed, whether any objection be taken by the parties concerned or not. It follows that such an action as this cannot possibly in point of law be maintained; and, that being so, to allow it to proceed would be merely vexatious and a waste of time and money. The reason for the law on this subject plainly appears from what Lord Ellenborough and many other judges have said. It is that it would be injurious to the public interest that such an inquiry should be allowed, because it would tend to take from an officer of state his freedom of action in a matter concerning the public weal. If an officer of state were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be so questioned before a jury, would clearly be against the public interest, and prejudicial to the independence necessary for the performance of his functions as an official of state. Therefore the law confers upon him an absolute privilege in such a case. For these reasons, I think the order of the Divisional Court was right, and should be affirmed.¹

v. Hamilton, 184 Pa. St. 108 (1898), there is no intimation as to whether the immunity is absolute or conditional, it being held that the privilege does not extend to statements not pertinent to matters under discussion nor to an irrelevant preamble to a resolution. In *Burch v. Bernard* and *Mauk v. Brundage*, a disposition is shown to restrict the privilege within very narrow bounds.

¹ Accord: *Grant v. Secretary of State for India*, L. R. 2 C. P. D. 445 (1877); *Spalding v. Vilas*, 161 U. S. 483 (1896). In *De Arnaud v. Ainsworth*, 24 App. D. C. 167 (1904), the protection is extended to a report by the head of a bureau to the Secretary of War. The privilege of inferior officers or of investigating committees is however conditional and not absolute, *Ranson v. West*, 125 Ky. 457 (1907); *Howland v. Flood*, 160 Mass. 509 (1894); *Barry v. McCollom*, 81 Conn. 293 (1908); *Hemmens v. Nelson*, 138 N. Y. 517 (1893). As to the immunity of reports by military officers to their superiors or to the War Office or Department, see *Dawkins v. Paulet*, L. R. 5 Q. B. 94 (1869), holding such reports absolutely privileged, *Maurice v. Worden*, 54 Md. 233 (1880), *contra*, and see 10 Col. L. R. 142-144. Petitions to parliament are absolutely privileged, *Lake v. King*, 1 Saund. 120 (1667); accord: *Harris v.*

SECTION 2.

Qualified Privilege—Defeasible Immunity.

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- (a) Communications made for the protection of the maker's property, interests, or reputation.
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BROW v. HATHAWAY.

Supreme Judicial Court of Massachusetts, 1866. 13 Allen, 239.

WELLS, J. The defendant's wife having lost goods from her store, and having grounds to suspect that the plaintiff had stolen them, the defendant applied to the chief of police, and, at his suggestion, went with a police officer to the house where the plaintiff resided with her mother, to make inquiry into the matter. No search-warrant was taken, but a search was made by permission of the mother and the plaintiff. No stolen goods were found.

The words alleged as slanderous were spoken by the defendant on that occasion, in reply to the inquiry of the mother as to "what they wanted," and in explanation of their visit. They all related to the subject-matter of the supposed theft, and the grounds which the defendant had to suspect the plaintiff. This statement furnishes the conditions which establish the legal position of "privilege," rebutting the presumption of malice which the law would otherwise imply, and making it incumbent upon the plaintiff to show malice in fact in order to recover.

The broad general principle is carefully stated in the case of *Toogood v. Spyring*, 4 Tyrwh. 582, which is referred to in nearly

Huntington, 2 Tyler 129 (Vt. 1802); *Reid v. Delorme*, 2 Brev. 76 (S. Car. 1806), but "petitions to subordinate legislative or other official bodies or to executive or administrative officers are privileged only if made in good faith", 10 Col. L. R. 139; *Kent v. Bongarts*, 15 R. I. 72 (1885); *Thorn v. Blanchard*, 5 Johns. 508 (N. Y. 1809); *Proctor v. Webster*, L. R. 16 Q. B. Div. 112 (1885); *White v. Nicholls*, 3 How. 266 (U. S. 1845); *Woods v. Wieman*, 122 N. Y. 445 (1890); *Gray v. Pentland*, 2 Serg. & R. 23 (Pa. 1815); *Ramsey v. Cheek*, 109 N. Car. 278 (1891), but see *Larkin v. Noonan*, 19 Wis. 82 (1865).

This has no operation in English and American law between the sovereign and his subjects, the nation or state and its citizen. Since no action can be brought against the sovereign or state without its express consent, the only protection that the subject or citizen has against abuse of sovereign power is suit against the minister in the name of the sovereign who gives or the official who executes commands in excess of the constitutional power of the sovereign. See cases cited in note 1 to *Rush v. Buckley*, 100 Me. 322. Nor is the office protected by a statutory power if the statute be unconstitutional, in fact one of the more usual means of testing the constitutionality of legislative enactments is by an action brought against the officer acting under it. This subject like perhaps that dealt with in the principal case is more properly part of administrative law.

all the later decisions upon this subject, and its doctrines have been quoted and approved by this court in *Swan v. Tappan*, 5 Cush. 104, and *Gassett v. Gilbert*, 6 Gray, 94. A narrower statement, applicable to the facts of the present case, is made by Lord Ellenborough in *Delany v. Jones*, 4 Esp. 191, namely: "If done *bona fide*, as with a view of investigating a fact, in which the party making it is interested, it is not libellous." To the same effect are *Padmore v. Lawrence*, 11 Ad. & El. 380, and *Fowler v. Homer*, 3 Camp. 294. In *Blackham v. Pugh*, 2 C. B. 620, Chief Justice Tindal says: "A communication made by a person immediately concerned in interest in the subject-matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true and without any malicious motive, is held to be excused from responsibility in an action for libel."¹

The judge who tried this cause instructed the jury that if the

¹ In *Blackham v. Pugh*, 2 C. B. 611 (1846), the defendant, a creditor of the plaintiff, sent a notice to the auctioneer who had sold the latter's goods not to pay over the proceeds to him, "he having committed an act of bankruptcy."

Accord: *Baker v. Carrick*, L. R. 1894, 1 Q. B. 838, facts similar to those in *Blackham v. Pugh*, 2 C. B. 611 (1846); *Campbell v. Bostick*, 22 S. W. 828 (Tex. Civ. App. 1893); *Whitely v. Adams*, 15 C. B. (N. S.) 392 (1863), statements explaining or defending one's business conduct; *Bohlinger v. Germania Life Ins. Co.*, 100 Ark. 477 (1911); *Harrison v. Garrett*, 132 N. Car. 172 (1903); *Nichols v. Eaton*, 110 Iowa, 509 (1900); *Phillips v. Bradshaw*, 167 Ala. 199 (1910), communications by a principal to his agent or an owner to his manager in regard to other agents, employes or customers; *Hebner v. Great Northern R. Co.*, 78 Minn. 289 (1899); *Tench v. Great Western R. Co.*, 33 U. Can. Q. B. 8 (1873), and *Hunt v. Great Northern R. Co.*, L. R. 1891, 2 Q. B. 189, communication to railway employes of the reasons for dismissing a fellow employe; *Bourgard v. Barthelmes*, 24 Ont. App. 431 (1897), statements by a master to a workman that the material that he was using was the property of a third person, stolen by a fellow workman; *Somerville v. Hawkins*, 10 C. B. 583 (1851), warning given to servants not to associate with another, who had been discharged; *Toogood v. Spyring*, 1 C. M. & R. 181 (1834), complaints by a tenant to his landlord or the latter's agent, against a workman sent to do repairs; *Amann v. Damm*, 8 C. B. (N. S.) 597 (1860), by one trader to another against a clerk of the latter sent on business to the former's premises; *Clapp v. Devlin*, 35 N. Y. Sup. Ct. 170 (1872), a consignor of a cargo, in an interview with the ship-owner in which he claimed that part of the cargo had not been delivered and accused the captain of stealing it; *Smith v. Smith*, 73 Mich. 445 (1889), *semble*, notice to tradesmen not to give credit to the defendant's wife, stated to have deserted him; *Echard v. Morton*, 26 Pa. S. C. 579 (1904), defendant, when confronted with a deed giving a right of way over his property, the existence of which he denied, made a statement implying that it was forged; *Force v. Warren*, 15 C. B. N. S. 806 (1864), the defendant, a butcher, had accused the plaintiff, a customer, of stealing meat, the plaintiff threatened him with an action, the defendant turned to another customer, present throughout the occurrence, and said, "She stole the meat, did you not see her do it?"; *Croft v. Stevens*, 7 H. & N. 570 (1862), a person alleged to have ordered goods from a tradesman wrote denying the order, which he stated was forged by the plaintiff.

A solicitor or attorney may make statements necessary for the protection of his client's interests as fully as he, himself, may do, *Hanna v. De Blaquiére*, 11 U. Can. Q. B. 310 (1852); *Hargrave v. Le Breton*, 4 Burr. 2422 (1769).

defendant used the words alleged, he was liable, "although he may have believed them to be true and may have had no malicious design to defame the plaintiff." This ruling, as it seems, must have been based upon the ground, either that the occasion was not one which furnished the excuse of "privilege," or that the defendant had, by some abuse of the privilege, lost the benefit of its protection. If upon the former ground, we think it was wrong as matter of law, both upon the authorities and upon principle. If upon the latter, it was a question not for the court, but for the jury.

This case must be distinguished from those in which the party pleading the excuse of "privilege" is guilty of making use of the occasion to utter charges of a character foreign to its legitimate purpose. As, for instance, if this defendant had, in addition to his statements in relation to the supposed theft, gone on to criminate the plaintiff generally, or to accuse her of unchastity, it would then have been the duty of the court, in an action for uttering such charges, to instruct the jury that as to such words, not appropriate to the legitimate objects of the occasion, it furnished the defendant no excuse whatever.² But in this case the language all related to the subject of the theft which they were investigating, and it should have been left to the jury to determine, upon all the circumstances of the case, whether the defendant was guilty of actual malice

Exceptions sustained.

² Accord: *Chapman v. Battle*, 124 Ga. 574 (1905), similar facts, and see *Moore v. Butler*, 48 N. H. 161 (1868); *Smith v. Smith*, 73 Mich. 445 (1889), the defendant inserted, in a notice not to give credit to his wife because of her desertion, scandalous and unnecessary imputations upon her; *Finden v. Westlake*, *Moody & Malkin* 461 (1829); *Daniel v. New York News Pub. Co.*, 21 N. Y. S. 862 (1893), affirmed without an opinion 142 N. Y. 660 (1894), and *Tillinghast v. McLeod*, 17 R. I. 208 (1891), *semble*.

The defendant must have an existing interest for the protection of which the information is appropriate, so a letter written by the agent of a defeated candidate for parliament to the agent of the successful candidate, accusing him of bribery, was held not to be privileged, *Dickeson v. Hilliard*, L. R. 9 Exch. 79 (1874). The recipient must be a person whose knowledge of the facts communicated will advance or protect the defendant's interests, *Bailey v. Holland*, 7 D. C. App. 184 (1895), letter by a stockholder of a bank, owned and managed by negroes, to the United States senator, complaining of the conduct of the plaintiff, also a negro, toward the bank and intimating that being false to his race he should be removed from a position held by him in the government service; and see *Simmonds v. Dunne*, Ir. R. 5 C. L. 358 (1871), and *Lynam v. Gowing*, L. R. 6 Ir. 259 (1880). Nor is the defendant privileged to introduce into a letter, though written on a matter of business interest to him, charges against third persons, not necessary for the protection of his interests or the proper statement of his business position, *Merchants Insurance Co. v. Buckner*, 98 Fed. 222 (C. C. A. 6th Circ. Taft, Lorton and Day, JJ. 1899).

But if the occasion be privileged it is immaterial in an action of libel or slander, that the defendant had obtained the information wrongfully, *Thurston v. Charles*, 21 Times L. R. 659 (1905), defendant wrongfully converted to his own use a letter from a third party to the plaintiff which he showed to another, whose relation to him made the occasion privileged, the plaintiff joined counts in libel and conversion, it was held he could not recover in the first count, though he was allowed to recover in the second. It is equally immaterial that the communication is a breach of confidence or

GASSETT v. GILBERT.

Supreme Judicial Court of Massachusetts, 1856. 6 Gray 94.

BIGELOW, J. There can be no doubt that the publication of the notice or "caution to the public," set out in the declaration, had a direct tendency to hold the plaintiff up to public reproach and disgrace; and was therefore actionable, unless it falls within the class of communications or statements usually termed privileged, that is, authorized by law, notwithstanding they may injuriously affect private character. The law regards the publication of all defamatory matter, which is false in fact, as malicious, and affords to the party injured a remedy in damages therefor. This is the general rule. But there are cases which constitute an exception to it. These are, when the cause or occasion of the publication is such as to render it proper and necessary for common convenience and the general welfare of society that the party making it should be protected from liability. In such cases, the occasion rebuts the inference of malice, which the law would otherwise draw from an unauthorized publication, and renders it necessary for the party injured to show actual malice, or, as it is sometimes called, malice in fact, as an essential element in support of his action.

The precise limits within which the publication of defamatory matter is allowed, as being privileged by the occasion, are best defined by Baron Parke, in the leading case of *Toogood v. Spyring*, 1 Cr. M. & R. 193, and 4 Tyrwh. 595. It is there laid down, that a publication "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned," comes within the class of privileged or authorized communications. A party can not be held responsible for a statement or publication tending to disparage private character, if it is called for by the ordinary exigencies of social duty, or is necessary and proper to enable him to protect his own interest or that of another, provided it is made in good faith, and without a wilful design to defame. This general statement of the doctrine on this point seems to be consonant with sound principle, and is supported by numerous authorities. Bul. N. P. 8. *Hargrave v. Le Breton*, 4 Bur. 2425. *Bromage v. Prosser*, 4 B. & C. 578. *Child v. Affleck*, 9 B. & C. 403. *Somerville v. Hawkins*, 10 C. B. 583. 1 Stark. Sland. 292.

By the application of these well-settled principles, the question raised in the present case can be satisfactorily determined. It appears that the defendants were the directors of a corporation called the Female Medical Education Society, established for the purpose of educating females in the science of medicine; that, for the purpose of raising funds in aid of the objects contemplated by their act of incorporation, they had resorted to the method of obtaining

professional duty, see *Robshaw v. Smith*, 38 L. T. 423 (1878); Bower on Actionable Defamation, 126 n. (c).

subscriptions from the public at large in various towns of this commonwealth, and that they had originally employed the plaintiff as an agent to obtain and collect such subscriptions. It further appears that the plaintiff ceased to be the agent of the corporation in December, 1850, and her authority to receive subscriptions and collect money in their behalf was then revoked.

There can be no doubt that it was the duty of the defendants, as directors of the corporation, to look after its prudential and financial concerns, and to take all the proper measures to see that the money raised by subscription, in aid of the institution under their charge, was collected and appropriated according to the intention of those from whom it was obtained. If they believed that the plaintiff, after her authority as such agent had ceased, was falsely representing herself as still authorized to collect subscriptions in behalf of the corporation, and was thereby wrongfully obtaining money from the public, they were justified in publishing a notice, couched in such language as was necessary and proper to put persons on their guard against her unauthorized representations, and to prevent her from receiving money under the false pretense that it was collected for the use and benefit of the corporation. Their private interest and their duty to the public alike required that such notice should be given, if they believed the facts stated in it to be true, and acted honestly and in good faith in making the publication. To this extent, we think that the occasion justified the defendants.¹

GERARD v. DICKENSON.

Court of King's Bench, 1577. 2 Coke Reports, Part IV, 18.

The plaintiff declared that he was seised of the manor and castle of H. in the county of Stafford in fee by purchase from George Lord Audley; and that he was in communication to demise the said castle and manor to Ralph Egerton for twenty-two years, for £200 fine, and £100 rental *per annum*; and that the defendant (*præmissorum non ignara*) said, "I have a lease of the castle and manor of H. for ninety years;" and then and there showed and published a demise supposed to be made by George Lord Audley, grand-

¹ *Accord: Holmes v. Royal Fraternal Order*, 222 Mo. 556 (1909), letter from the Order to its members notifying them of the removal of the plaintiff, as collecting officer, giving reasons and warning them not to pay their dues to him; *Hatch v. Lane*, 105 Mass. 394 (1870), notice to customers not to pay their bills to a discharged employé, who the defendant stated to have "taken upon himself the privilege of collecting my bills;" *Nevill v. Fine Art & Gen. Ins. Co.*, L. R. 1897, A. C. 68, notification to customers, etc., of termination of plaintiff's agency, but see *Warner v. Clark*, 45 La. Ann. 863 (1893); *Sheftall v. Cent. of Ga. R. Co.*, 123 Ga. 589 (1905), bulletin issued by the company to its conductors warning them not to accept certain tickets stated to have been improperly retained by the plaintiff, a discharged conductor; *Holmes v. Clisby*, 121 Ga. 241 (1904), *semble*, statements by a manufacturer that genuine first-hand goods could be only procured from a particular retailer.

father to the said George Lord Audley, for ninety years, to Edward Dickenson her husband, and published the said demise as a true and good lease; and so affirmed it, and offered to sell it; *ubi re vera* the said lease was counterfeited by her husband, and that the defendant knew it to be counterfeited; by reason of which words and publication, the said Ralph Egerton did not proceed to accept the said lease, to damage, &c. The defendant pleaded in bar, *quod talis indentura (qualis in the declaration is alleged)* came to the defendant's hands by trover, and traversed that she knew of the forgery, upon which the plaintiff demurred in law. And in this case three points were resolved. 1. If the defendant had affirmed and published, that the plaintiff had no right to the castle and manor of H. but that she herself had right to them, in that case, because the defendant herself pretends right to them, although in truth she had none, yet no action lies.¹ For if an action should lie when the defendant herself claims an interest, how can any make claim of title to any land, or begin any suit, or seek advice and counsel, but he should be subject to an action, which would be inconvenient.² Which resolution agrees with the opinion in Banister's Case before,

¹ The later cases allow an action against even a rival claimant if "made *mala fide* for the purpose of injuring the plaintiff and not in the *bona fide* defense of the defendant's own property;" Coleridge, C. J. in *Halsey v. Brotherhood*, L. R. 19 Ch. Div. 386 (1881); *Linville v. Rhoades*, 73 Mo. App. 217 (1898), unless made in the pleadings or testimony in legal proceedings to assert or defend a supposed right, *Bailey v. Dean*, 5 Barb. 297 (N. Y. 1848); *Maginn v. Schmick*, 127 Mo. App. 411 (1907).

² *Accord: Hargrave v. Le Breton*, 4 Burr. 2422 (1769); *Smith v. Spooner*, 3 Taunt. 246 (1810), in both, notice of defendant's adverse claim was given at auction of plaintiff's property; *Ontario Industrial Loan and Investment Co. v. Lindsey*, 4 Ont. R. 473 (1883); *Hill v. Ward*, 13 Ala. 310 (1848), notice of adverse claim given to intending purchaser of slaves; *Bailey v. Dean*, 5 Barb. 297 (N. Y. 1848), *semble: Butts v. Long*, 106 Mo. App. 313 (1904); *Harrison v. Howe*, 109 Mich. 476 (1896), and *Hopkins v. Drowne*, 21 R. I. 20 (1898), notice by landlord to one intending to sublet from tenant, that the lease gave no right to do so; *Stieh v. Todd*, 11 Montg. L. R. 70 (Pa. 1893), notice, at sale of tenant's goods, of a levy for rent, in fact discharged upon payment; *McDaniel v. Baca*, 2 Cal. 326 (1852), notice to intending purchaser that plaintiff had obtained the property from the defendant by fraud; *Duncan v. Gristwold*, 92 Ky. 546 (1892), notice that judgment held by defendant covered land about to be sold by plaintiff; *Brady v. Carteret Realty Co.*, 67 N. J. Eq. 641 (1904), *semble*, notice of adverse claim at sheriff's sale; and see *Walkley v. Bostwick*, 49 Mich. 374 (1882), and *Thompson v. White*, 70 Cal. 135 (1886).

So one claiming to own a patent right, or that a certain article or process is covered by a patent owned by him, may notify the public of his claim and warn them against infringing upon his supposed right; *Wren v. Weild*, L. R. 4 Q. B. 213 (1869); *Hovey v. Rubber Tip Pencil Co.*, 57 N. Y. 119 (1874); *Squires v. Wason Mfg. Co.*, 182 Mass. 137 (1902), especially if advised by counsel that his claim is valid, *Everett Piano Co. v. Bent*, 60 Ill. App. 372 (1895), but by statute 7 Edw. VII, c. 29, § 36, he must show that the acts complained of are actually infringements, or must "with due diligence and prosecute an action for infringement of his patent," see *Skinner v. Shew*, L. R. 1893, 1 Ch. 413. So one believing that he has a copyright of a poem may publish a statement that the publication of the poem by others is an infringement thereof, *Lovell Co. v. Houghton*, 116 N. Y. 520 (1889).

The defendant's statement or notice must show that he is asserting

2 E. 4. 5. b. &c. 15 E. 4. 32 a. b. no action upon the case lies against one who publishes another to be his villain, without saying that he lies in wait to imprison him, *et tales & tantas minas in ipsum fecit, quod circa negotia sua palam intendere non audebat*. Vide 22 E. 3. 1. in Cro. Eliz. 197, Conspiracy, 38 E. 3. 33. 43. E. 3. 20. F. N. B. 116. b. And therefore it was resolved, that for the said words, "I have a lease of the manor of H. for ninety years," although it is false, yet no action lies for slandering of his title or interest in the said castle and manor. And although it appears by the defendant's bar, that she has no title or interest in the said lease, but is a stranger to it; yet forasmuch as the matter alleged in the declaration doth not maintain the action, the bar will not make it good. 2. It was resolved, that there was other matter in the declaration sufficient to maintain the action, and that was because it was alleged in the declaration that the defendant knew of the communication of the making of the said lease to Ralph Egerton, and also that she knew that the lease was forged and counterfeited, and yet (against her own knowledge) she has affirmed and published, that it was a good and true lease, by which the plaintiff was defeated of his bargain. Vide 5 E. 4. 126. If a man forges a bond in my name, and puts it in suit against me, by which I am vexed and damnified, I shall have an action on the case, 42 Aff. 8., B. offered eight oxen to sell to A. as his proper goods, knowing them to be the proper goods of P. A. trusting in the fidelity of B. bought them for £8 and afterwards P. retook the oxen; in that case A. shall have an action upon the case against B.

And these are all in effect all the cases in our books.

FAIRCLOTH, C. J. IN CARDON v. McCONNELL.

Supreme Court of North Carolina, 1897. 120 N. C. Rep., 461.

It is the duty of one, believing that he has such a claim or interest, to proclaim and assert it when a sale is in contemplation by another, in order that innocent persons may not be deceived or misled to their injury. If one be inquired of, he must speak the truth as he understands it and believes it to be. If he is present at a public sale of property claimed by himself, he must speak for the protection of purchasers or he will be forever estopped. If, at last, upon investigation, the defendant fails to show any title or in-

some right claimed by him, it is not enough that he is in fact a rival claimant, *Earl of Northumberland v. Byrt*, Cro. Jac. 163 (1607), and even one speaking as a claimant may not make disparaging statements as to the plaintiff's title not necessary to the assertion of his claim, *Brady v. Carteret Realty Co.*, 67 N. J. Eq. 641 (1904).

While a trader is not privileged in positively disparaging his rival's goods in order to prosper at his expense, *Brown v. Vanaman*, note to *Over v. Schiffing*, ante, *Whittemore v. Weiss*, 33 Mich. 348 (but see Clerk and Lindsell on Torts, 6th ed., pp. 687-688), it seems that mere disparaging comparison of a rival's goods with those of the defendant is only actionable, if known to be false or done solely to injure the rival and without any desire for self-advancement, *Herschell, L. C. in White v. Mellin*, L. R. 1895, A. C. 154, pp. 160-161.

terest in possession or in remainder, still, if his acts were done in good faith at the time he spoke, no action will lie. The plaintiff, claiming damages, must show malice—that there was no probable cause for the defendant's belief—that he could not honestly have maintained such belief. The prevention of a sale by the assertion of a claim by A, although unfounded, is not actionable unless it be knowingly bottomed on fraud. 4 Rep. 18; 4 Burr. 2422.

DWYER v. ESMONDE.

Court of Appeal, 1878. L. R. Ireland, 1878-79, Vol. II, 243.

THE LORD CHANCELLOR:—This is an appeal from a decision of the Court of Exchequer, allowing a demurrer to a plea in an action for libel. The plea is in effect that the publication complained of was a privileged communication. Mr. Esmonde was candidate for the representation of the county of Waterford in Parliament. In "The Freeman's Journal" there appeared "an address" to the farmers of that county, purporting to come from the Kilkenny Farmers' Association, intended to injure Mr. Esmonde's canvass, and condemning his conduct as a landlord, particularly in relation to the present plaintiff Dwyer, who had been his tenant, and was evicted for non-payment of rent. Mr. Esmonde wrote in "The Freeman's Journal," by way of answer to this address, a letter which is the libel now complained of. The plea defends its publication on the ground that the publication of the address in "The Freeman's Journal" was caused by the plaintiff and others, that journal being extensively circulated in the county of Waterford among the electors; that the letter sued upon was written and published in answer to the charges made in the address against the defendant, in defense of himself in relation thereto, *bona fide*, without malice, and believing the same to be true.

It is to be observed that the Court of Exchequer, by a majority of its judges, refused to admit the "Address of the Kilkenny Tenant Farmers' Association" to be read upon the argument of the demurrer; whereas this Court, by a majority of its members, has decided that this address is incorporated with the plea, and that the entire of it is to be taken into consideration by the Court. We have, therefore, elements for our judgment which the Court of Exchequer had not.

The address makes general charges against Mr. Esmonde as landlord of a property in Kilkenny; and even goes so far as to designate him as "the true type of a bad Irish landlord, the scourge of the country." But for the purpose of the present appeal, I think attention need only be directed to such allegations as relate to the present plaintiff, which I now read:—

"One tenant, John Dwyer, holding sixty acres, met with an accident, and became embarrassed—old arrears hanging over him! Mr. Esmonde dispossessed him; he is able and willing to undertake the farm—yet it is lying waste and idle on Mr. Esmonde's hands for the last two years; and let that gentleman inform you whether,

with the keen competition for the land in the locality, it is the bad land or the bad landlord that deters any man from becoming his tenant, or for a long time from becoming even a caretaker of the farm?"

The charge here appears to be by no means confined to the eviction from the farm; supposing that to have occurred from non-payment of rent, caused by an accident, then when Dwyer was able and willing to undertake the farm, Mr. Esmonde still, rather than set it to him, keeps the land idle on his own hands.

The charge against Mr. Esmonde being of this character, he defends himself by giving a sketch of the man who, it is alleged, should have been retained, or, when evicted, reinstated in the farm; and here I refer to the document, and do not confine myself to the extracts in the plaint. He says that the reason why he ejected John Dwyer was simply for non-payment of rent; that the Dwyer family consisted of John and two sisters, and that, on the day after the execution of the *habere*, they forced the lock of the door, and were found seated before the fire within the dwelling house; the aid of the sub-sheriff had again to be called in before he could regain possession of his property; that for nine months he was unable, although he advertised, to procure a caretaker for the farm; and, some months afterwards, he discovered that the plaintiff had got a meadow of four and a-half acres mown, and had carried off the hay and sold it—a matter which Mr. Esmonde suggests was a crime for which Dwyer could have been made amenable; that, besides all this, Dwyer had acted ill to his sisters, who had portions charged on the very farm—not paying them, any more than the landlord; and, finally, Mr. Esmonde points out that it was due to a threatening notice that the land had not been let. The innuendos of the plaint suggest that this amounts to definite charges that the plaintiff was guilty of forcible entry, of intimidating anyone from becoming caretaker, of an indictable offence in selling the hay, of fraudulently retaining from his sisters their portions, and of being instrumental in having the threatening notices feloniously sent to an intending tenant of the farm.

The case of *O'Donoghue v. Hussey*, Ir. R. 5 C. L. 124, decided by the Irish Court of Exchequer Chamber, established that if a person be assailed in a newspaper, he is excused if in self-defense he has recourse to the public press, and brings forward *bona fide*, without malice, in the belief that they are true, statements having relation to the charge, which, in themselves, and apart from the occasion, would be libels without excuse. The circumstances rebut the presumption of malice otherwise arising from the words. In order to take the present case out of this rule, it is argued that what is alleged by Mr. Esmonde in respect of the plaintiff, particularly as to his conduct to his sisters, is not relevant to the charge made against Mr. Esmonde in the Kilkenny Farmer's Address. But is this so? Observe Mr. Esmonde is, in that document, held up for condemnation, not only in respect of the eviction of Dwyer, but also for subsequently excluding him from the farm, when it is said he

was able to undertake it. All the matters put forward in explanation of the course adopted had their origin in Dwyer's original position as tenant. The portions of his sisters were charged upon the farm, and payable by him out of its proceeds. The reasoning is in effect that, whether regard be had to his non-fulfilment of his obligations to his landlord or his sisters in connection with the farm while he continued tenant, or to his personal conduct after he was evicted, he is not a person whom a landlord can be justly censured for not restoring. If what was stated tended to establish that conclusion, it was relevant—perhaps I ought to go farther, and say that whatever tended to establish it for the tribunal to which the address and the answer were both directed, namely, the electors of the county of Waterford, was also relevant. Whichever test we adopt, it appears to me that the defamatory matter which has in this case been complained of was sufficiently connected with the vindication of the defendant's character to remove any objection to its publication founded upon want of relevancy. The demurrer should, in my opinion, have been overruled, of course with costs, in the court below; and, in this case, we think the plaintiff must also pay the costs in the Court of Appeal.

MORRIS, C. J.:—The chief reliance of the plaintiff during the argument has been on the fourth charge; that is, that the plaintiff had fraudulently retained from his sisters sums to which they were entitled under their father's will, *charged on the farm*. This is not a charge of independent and unconnected improper conduct by the plaintiff, but of improper conduct in relation to his tenancy of the farm the subject of discussion, and in relation to which farm the plaintiff had accused the defendant of gross misconduct and harshness, as landlord, to him the plaintiff, as his tenant.

CHRISTIAN, L. J.:—Well, Mr. Esmonde, thus arraigned, before the electors of the county of Waterford in particular, as one utterly unfit to be chosen as their representative, and before the public in general, including his own tenantry, as a cruel and tyrannical landlord, had two courses open to him:—he might either have thought of what he owed to himself as a man and a proprietor, and to the interests of public order, by bringing his libellers before the tribunals of the land; or, he might only have regarded his chances as a candidate, and pleaded at the bar of the rural *forum* before which his assailants had brought him. Well, he chose the latter course. Instead of an action or an indictment, he stooped to the level of his assailants, and put his vindication in the shape of a letter to the editor of the same newspaper. That was the form it took, but in substance the persons addressed were the tenant-farmers of the county of Waterford. And, however others may blame his choice of a course, assuredly it does not lie in the mouth of the plaintiff or of his co-libellers to do so. Under these circumstances, it is as plain a proposition as was ever enunciated that the occasion gave to Mr. Esmonde a privilege of laying before the electors of the county he was canvassing every circumstance of Dwyer's conduct in relation to the farm—(I might put it further, but it is needless

to do so)—which would be calculated to satisfy ordinarily reasonable men that he was one whom a just and even an indulgent landlord might reasonably object to retaining, still more, to reinstating on his land. That those circumstances would be in the highest degree defamatory, if Dwyer himself had not been the aggressor, might make them all the more proper to be covered by the privilege, because all the more demonstrative of Dwyer's objectionableness. The defendant might, in exercising this privilege, fall into excesses of phrase or intemperance in expression which would indicate an *animus* going beyond the bounds of self-defense. But the effect of that would be, not to take the subject out of the privilege, but to constitute evidence from which the jury might or might not infer malice in fact; the malice in law, which is implied *prima facie* in the mere publishing of defamatory matter being repelled by the privilege of the occasion.¹

(b) Communications for the protection of the common interests of the maker and recipient.

MCDOUGALL v. CLARIDGE.

Court of King's Bench, 1808. 1 Campbell, 267.

This was an action for a libel on the plaintiff in his profession as a solicitor.—Plea, *the general issue*.

The libel set out in the declaration was contained in a letter written by the defendant to Messrs. Wright & Co., bankers at Nottingham, and charged the plaintiff with improper conduct in the management of their concerns. It appeared, however, that the

¹ *Accord: Hermmings v. Gasson*, E. B. & E. 346 (1858); *Hibbs v. Wilkinson*, 1 F. & F. 608 (1859); *Koenig v. Ritchie*, 3 F. & F. 413 (1862); *Reg. v. V'eley*, 4 F. & F. 1117 (1867); *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495 (1872), p. 508; *Mielly v. Soule*, 49 La. Ann. 800 (1897); *Shepherd v. Baer*, 96 Md. 152 (1902); *Myers v. Kaichen*, 75 Mich. 272 (1889); *Fish v. St. Louis, etc., Publishing Co.*, 102 Mo. App. 6 (1903), *semble*; *Chaffin v. Lynch*, 83 Va. 106 (1887), 84 Va. 884 (1888), and an agent of a corporation may answer an attack upon it, *Koenig v. Ritchie*, *supra*.

But one insult does not justify or be set off against another, *Bourland v. Eidson*, 8 Grat. 27 (Va. 1851), and the fact that the plaintiff had slandered or libeled the defendant does not justify him in publishing orally, *Senior v. Medland*, 4 Jur. N. S. 1039 (1858), *De Pew v. Robinson*, 95 Ind. 109 (1884), or in the public press, defamatory statement in regard to the plaintiff not responsive to or explanatory of the latter's attack, *Fish v. St. Louis, etc., Publishing Co.*, 102 Mo. App. 6 (1903), *Xavier v. Oliver*, 80 App. Div. 292 (N. Y. 1903), nor, while he can accuse him of untruthfulness or "propensity to make injurious statements devoid of foundation" and give instances of indulgence therein, *O'Donoghue v. Hussey*, Ir. R. 5 C. L. 124 (1871), may he accuse him of unconnected crimes to show him to be degraded and so unworthy of credit, *Brewer v. Chase*, 121 Mich. 526 (1899).

In *Murphy v. Halpin*, Ir. R. 8 C. L. 127 (1874), it was held that the defendant was not privileged to publish in the public papers an attack upon the plaintiff, in answer to statements made by the latter at a meeting of a board

letter was intended as a confidential communication to these gentlemen, and that the defendant was himself interested in the affairs which he supposed to be mismanaged by the plaintiff.—After the case had been opened by the plaintiff's counsel—

LORD ELLENBOROUGH said, if the letter had been written by the defendant confidentially, and under the impression that its statements were well founded, he was clearly of opinion that the action could not be maintained. It was impossible to say that the defendant had maliciously published a libel to aggrieve the plaintiff, if he was acting *bona fide*, with a view to the interests of himself and the persons whom he addressed; and if a communication of this sort, which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted.¹ His Lordship referred to

of guardians of which he was a member, though reported without his procurement or consent in a newspaper.

As to the right in private communications to cast imputations upon others or to comment publicly upon their conduct in repelling a charge made against oneself or in explaining one's conduct so as to prevent injurious interpretations being put upon it, see *Coward v. Wellington*, 7 C. & P. 531 (1836), *Whiteley v. Adams*, 15 C. B. (N. S.) 392 (1863), and *O'Connor v. Sill*, 60 Mich. 175 (1886).

¹ So the stockholders of a company may inform one another or the officers of the company of anything which they honestly believe to have been done by a fellow stockholder, official, or employee of the company prejudicial to their joint interest, either privately, *Chambers v. Leiser*, 43 Wash. 285 (1906); *Quartz Hill Co. v. Beall*, L. R., 20 Ch. Div. 501 (1882); *Haney v. Trost*, 34 La. Ann. 1146 (1882); *Scullin v. Harper*, 78 Fed. 460 (C. C. A. 1897), or in a meeting of the stockholders, *Parsons v. Surgey*, 4 F. & F. 247 (1864); *Broughton v. McGrew*, 39 Fed. 672 (1889). So a member of an association, social, beneficial, fraternal or professional may make complaint to the society or its officers of supposed conduct of a fellow member in violation of the by-laws or prejudicial to it or contrary to its objects and ideals, *McKnight v. Hasbrouck*, 17 R. I. 70 (1890); *Graham v. State*, 6 Ga. App. 436 (1909); *Lovejoy v. Whitcomb*, 174 Mass. 586 (1899), *semble*, if, and only if, such complaint is made in order to bring about an investigation leading to the expulsion or discipline of the offending member.

So a corporation may inform its stockholders by letter or circular of the supposed misconduct of an officer or employee, *P. W. & B. R. Co. v. Quigley*, 21 How. 202 (U. S. 1858); *Lawless v. Anglo-Egyptian Cotton & Oil Co.*, L. R. 4 Q. B. 262 (1869), or may explain its corporate acts, though the explanation is defamatory to third persons, *Montgomery v. Knox*, 23 Fla. 595 (1887). The same privilege attaches to the reports of a college board of trustees to its contributors of its reasons for removing its president, *Gattis v. Kilgo*, 140 N. Car. 106 (1905), or of a fraternal association to its members of the expulsion of a member, *Kirkpatrick v. Eagle Lodge*, 26 Kans. 384 (1881).

In *Redgate v. Roush*, 61 Kans. 480 (1900), it is held that the officers of a church may communicate to all the other members of the same denomination, through the medium of their church papers, notice of the disposition of their pastor and the reasons therefor, *Shurtleff v. Stevens*, 51 Vt. 501 (1879); *Konkle v. Haven*, 140 Mich. 472 (1905); *Clark v. Molyneux*, L. R. 3 Q. B. D. 237 (1877); *Whiteley v. Adams*, 15 C. B. (N. S.) 392 (1863); *James v. Boston*, 2 C. & K. 4 (1845); and compare *Shurtleff v. Parker*, 130 Mass. 293 (1881), where it was held that a member of and a preacher in one congregational association was not privileged to inform a member of another such association of the supposed character of another member of the latter, who was in fact a dismissed preacher,

a case of *Cleaver v. Sarraude*, tried on the northern circuit while he was at the bar; where, in an action like the present, it appeared that the letter had been written confidentially to the Bishop of Durham, who employed the plaintiff as steward to his estates, to inform him of certain supposed mal-practices on the part of the plaintiff; upon which the judge who presided declared himself of opinion, that the action was not maintainable, as the defendant had been acting *bona fide*; and the nonsuit which he directed had been acquiesced in, from a conviction entertained by the plaintiff's counsel of its being founded in law.

HARRISON v. BUSH.

Queen's Bench, 1855. 5 *Ellis & Blackburn*, 344.

LORD CAMPBELL, C. J., in this term (May 24th) delivered the judgment of the court.¹

This was an action for a libel, tried before my Brother Crowder at the last Salisbury assizes. The defendant pleaded not guilty, and a justification.

It appeared that Dr. Harrison, the plaintiff, before and at the time when the cause of action accrued, was a justice of peace for the county of Somerset, and was in the habit of acting at petty sessions held in the borough of Frome. In the month of October last, there was a contested election, for a member to represent this borough in Parliament. During the election, there was much excitement; many windows were broken by the mob; and there were dangerous riots in the streets. The defendant was an elector and an inhabitant of the borough; and, after the election was over, he and several hundred other inhabitants of the borough prepared, signed and transmitted to Viscount Palmerston a memorial complaining of the conduct of the plaintiff as a magistrate during the election, imputing to him that he had made speeches directly inciting to a breach of the peace; that, after reading the Riot Act, he had sent a man into the

In the following cases statements made for the protection of a common interest were held privileged, *Knight v. Gibbs*, 1 A. & E. 43 (1834), landlord made statements to tenant as to inmates of the house occupied by the latter; *Wilson v. Robinson*, 7 Q. B. 68 (1845), statements by one who had sold his interest in a vessel to the other joint owner, as to the plaintiff's conduct while managing their joint interests; *Hamon v. Falle*, L. R. 4 A. C. 247 (1879), an insurance company wrote to an owner of a vessel refusing to insure it if the plaintiff was made the captain of the vessel; *Wagner v. Scott*, 164 Mo. 289 (1901), the defendant and the person to whom the statement was made jointly employed the plaintiff; *Trimble v. Morrish*, 152 Mich. 624 (1908), doctor made defamatory statements to a druggist, who by contract had the right to fill the doctor's prescriptions, in regard to the druggist's clerk; *Allen v. Cape Fear, etc., R. Co.*, 100 N. Car. 397 (1888); *Warner v. Missouri Pacific R. Co.*, 112 Fed. 114 (1901), statements in regard to consignors of freight, made by one connecting railroad to another; and see *Wiemann v. Mabee*, 45 Mich. 484 (1881).

¹ Only so much of the opinion is given as relates to the question as to whether the memorial was privileged if sent to a person who had the power to remove the plaintiff from his magistracy.

streets armed with a bludgeon, and ordered him to strike any person he might meet, indiscriminately; and that he had himself violently struck and kicked several men and women. The memorial alleged that the plaintiff ought not to be allowed to remain in her Majesty's commission of the peace, and concluded thus: "Your memorialists therefore earnestly pray that your Lordships will cause such an inquiry to be made into the conduct of the said Dr. Harrison as your Lordship may think fit; and that, on the allegations contained in the memorial being duly substantiated and verified, your Lordship will feel it to be your duty to recommend to her Majesty that the said Dr. Harrison be removed from the commission of the peace."

The learned judge said that, on the authority of *Blagg v. Sturt*, 10 Q. B. 899, he should rule that the memorial to the Secretary of State was not a privileged communication, but would reserve leave to the defendant to move to enter a verdict for him, if the jury found *bona fides*.

A rule has been obtained to enter a verdict for the defendant; and this, we think, ought to be made absolute.

During the argument, a legal canon was propounded for our guidance by the plaintiff's counsel; and this we are willing to adopt, as we think that it is supported by the principles and authorities upon which the doctrine of privileged communications rest. "A communication made *bona fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminary matter which, without this privilege, would be slanderous and actionable." In the present case, little need be said to show that the communicator had both an *interest* and a *duty* in the subject-matter of the communication. Assuming that Dr. Harrison had misconducted himself as a magistrate in the manner alleged, all the electors and inhabitants of Frome had suffered a grievance by a magistrate having fomented the riot instead of quelling it, and having endangered instead of protecting life and property within the borough. They have an *interest* that they may not longer remain subject to the jurisdiction of a magistrate who so violates the law. Again, if Dr. Harrison had so misconducted himself as a magistrate, he had committed an offence; and it was the *duty* of those who witnessed it to try by all reasonable means in their power that it should be inquired into and punished. "Duty," in the proposed canon, cannot be confined to legal duties which may be enforced by indictment action, or mandamus, but must include moral and social duties of imperfect obligation. One mode of proceeding for this offence would have been by applying to us for a criminal information, and seeking to have the offender punished by fine and imprisonment. But another, which, though milder, may be more effectual, is to try by lawful and constitutional means to have the offender removed from his office, without calling down upon him the sentence of a criminal court. In this land of law and liberty, all who are aggrieved may seek redress;

and the alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and the duty to inquire into it, and to take steps which may prevent the repetition of it.³

But it was hardly contended that this memorial would not have a privileged communication if it had been addressed to a public functionary possessing the direct power of removing a magistrate from the commission of the peace.

We think that we are not called upon at present to decide how far an honest mistake in seeking redress subjects a person to civil or criminal responsibility; and we give no opinion on the question whether action or indictment could be maintained against individuals living under the jurisdiction of a county court judge in the county palatine of Lancaster, who should *bona fide* present a criminatory memorial against him to the Lord High Chancellor, praying for his removal, instead of presenting it to the Chancellor of the Duchy of Lancaster, in whom, and in whom alone, the power of removing him is vested.³

We are of opinion that the defendant fell into no mistake whatever in the course which he adopted, and that, although he might have addressed the memorial to the Lord Chancellor, in which case it certainly would have been privileged, it is equally privileged being addressed to the Secretary of State.

Rule absolute.⁴

³ So complaints of the conduct of an official, made to his superiors, for the purpose of obtaining redress or of securing better behavior in the future, are privileged, *Woodward v. Lander*, 6 C. & P. 548 (1834); *Corbett v. Jackson*, 1 U. C. Q. B. 128 (1843); *McIntire v. McBean*, 13 U. C. Q. B. 534 (1855), and so is a petition to a governor to veto a bill, *Wood v. Wiman*, 122 N. Y. 445 (1890), a taxpayer's protest against the allowance of fees charged by a State's Attorney, *Young v. Richardson*, 4 Ill. App. 364 (1879), or a petition remonstrating against the granting of a liquor license, *Vandersee v. McGregor*, 12 Wend. 545 (N. Y. 1834); *Coloney v. Farrow*, 5 App. Div. (N. Y.) 607 (1896); *Metzler v. Romine*, 9 Pa. Co. Ct. R. 171 (1890); *Werner v. Ascher*, 86 Wis. 349 (1893), *semble*.

So petitions to the king or parliament, or a secretary of state, for the redress of a grievance are held privileged in *Fairman v. Ives*, 5 B. & Ald. 642 (1822); *Rogers v. Spalding*, 1 U. C. Q. B. 258 (1843); *Reid v. Delorme*, 2 Brev. 76 (S. Car. 1806), petition to legislature complaining of the failure of the Attorney-General to institute certain prosecution.

⁴ Defamatory statements as to the conduct of public officers are not privileged if made to the public, *Werner v. Ascher*, *supra*, or to an official known to have no power to investigate the matter and remove or control such officers, *Logan v. Hodges*, 146 N. Car. 38 (1907), and see *Callahan v. Ingram*, 122 Mo. 355 (1894).

Nor are statements of the purely private conduct of a public officer, having no connection with his public duties, *Wood v. Boyle*, 177 Pa. St. 620 (1896).

As to the right of the community to know how their public officers conduct themselves, and so a newspaper's privilege to publish in good faith information thereof honestly and with good cause believed to be true, see *O'Rourke v. Lewiston Sun*, 89 Maine 310 (1896), but mere gossip or rumors affords no justification, especially if the defendant refuse or neglect an opportunity offered by the plaintiff to investigate their truth, *State v. Ford*, 82 Minn. 452 (1901).

⁵ *Accord*: Communications or petitions asking for the removal of a public officer addressed to a person or body having power of removal; *White v.*

COLEMAN v. MACLENNAN.

Supreme Court of Kansas, 1908. 78 Kansas Reports, 711.

BURCH, J. The moral and social duty of members of a great fraternity, or of a great church organization, to inform their brothers of the scandalous conduct of a fellow member or one of their leaders, is no higher or stronger than that of electors to keep the public administration pure by warnings respecting the character and conduct of a candidate for office; and if false words are not actionable in one case, unless published with actual malice, they are privileged to the same extent in the other. Such is the clear declaration of the court in the case of *The State v. Balch*, 31 Kans. 465, 2 Pac. 609. True, that was a criminal case, but the rule of privilege is the same in both civil and criminal actions. It is the occasion which gives rise to privilege, and this is unaffected by the character of subsequent proceedings in which it may be pleaded.

In Balch's case, a printed article making grave charges against the character of a candidate for county attorney, was circulated among the voters of the county previous to the election. In the opinion holding the occasion to be privileged the court said:

"If the supposed libelous article was circulated only among the voters of Chase county, and only for the purpose of giving what the defendants believed to be truthful information, and only for the purpose of enabling such voters to cast their ballots more intelligently, and the whole thing was done in good faith, we think the

Nicholls, 3 How. 266 (U. S. 1845); *Pearce v. Brower*, 72 Ga. 243 (1884); *Greenwood v. Cobbe*, 26 Nebr. 449 (1889); *State v. Burnham*, 9 N. H. 34 (1837); *Frank v. Dessena*, 5 N. J. L. Journ. 185 (1882); *Thorn v. Blanchard*, 5 Johns. 508 (N. Y. 1809); *Van Wyck v. Aspinwall*, 17 N. Y. 190 (1858); report of a committee of the College of Pharmacy to the Secretary of the United States Treasury, complaining of the conduct of an inspector of drugs; *Bradsher v. Cheek*, 109 N. Car. 278 (1891); *Gray v. Pentland*, 2 Serg. & R. 23 (Pa. 1815); *Kent v. Bongartz*, 15 R. I. 72 (1885); *Hart v. von Gumpach*, L. R. 4 P. C. 439 (1872), complaint by a Chinese official to Chinese board of conduct of a professor in its employ; or to a committee or officer investigating his conduct, *Blakeslee v. Carroll*, 64 Conn. 223 (1894); *Beatson v. Skene*, 5 H. & N. 838 (1860); Communications, petitions and complaints against public school teachers made to school boards, etc., *Bodwell v. Osgood*, 3 Pick. 379 (Mass. 1825); *Decker v. Gaylord*, 35 Hun 584 (N. Y. 1885); *Malone v. Carrico*, 16 Ky. L. 155 (1894); Communications as to character of an applicant for office made to persons having power of appointment, *Coogler v. Rhodes*, 38 Fla. 240 (1902); *Harris v. Huntington*, 2 Tyler 129 (Vt. 1802), or to an officer investigating the character of the applicant, *Posnett v. Marble*, 62 Vt. 481 (1889), or to a senator, who as such votes upon the confirmation of the applicant's nomination, *Law v. Scott*, 5 Har. & J. 438 (Md. 1822).

Such petitions and communications are qualifiedly, not absolutely, privileged, *Proctor v. Webster*, L. R. 16 Q. B. Div. 112 (1885); *Dickson v. Wilton*, 1 F. & F. 419 (1859), and cases cited above, but see *Larkin v. Noonan*, 19 Wis. 82 (1865). In *Howard v. Thompson*, 21 Wend. 319 (N. Y. 1839), it is held that the action for such a complaint while in form for libel is in substance for malicious prosecution and plaintiff must show both lack of probable cause and malice, *accord*, *Cook v. Hill*, 3 Sandf. 341 (N. Y. 1849), and compare *Woods v. Wiman*, 122 N. Y. 445 (1890).

article was privileged and the defendants should have been acquitted, although the principal matters contained in the article were untrue in fact and derogatory to the character of the prosecuting witness. * * * Generally, we think, a person may, in good faith, publish whatever he may honestly believe to be true, and essential to the protection of his own interests or the interests of the person or persons to whom he makes the publication, without committing any public offense, although what he publishes may, in fact, not be true and may be injurious to the character of others. And we further think that every voter is interested in electing to office none but persons of good moral character, and such only as are reasonably qualified to perform the duties of the office. This applies with great force to the election of county attorneys."

The plaintiff asks that the decisions of this court quoted above be overruled, and that they be supplanted by one which shall express the narrow conception of the law of privilege held by the majority of the courts.

The fact that so many courts of this country, all of high character, of great learning and ability, and all equally interested in correctly solving the problems of free government, differ from us, makes us pause; but a reversal of policy and the overturning of what has been so long accepted as settled law would be tantamount, under the circumstances, to legislation. Such a step ought not to be urged upon the court except for conclusive reasons. What are the reasons supporting the majority rule? The decisions most freely quoted since it was rendered, in 1893, and chiefly relied upon by the plaintiff here, is that of the United States circuit court of appeals for the sixth circuit in the case of *Post Publishing Company v. Hallam*, 16 U. S. App. 613, 8 C. C. A. 201, 59 Fed. 530. Counsel in the case had argued from the duty of newspapers to keep the public informed concerning those who are seeking their suffrages and confidence, and had asked if it were possible that the privilege allowed in discussing the character of public servants should be less than that which protects defamatory statements made concerning a private servant. The opinion states this argument, and then proceeds as follows:

"The existence and extent of privilege in communications is determined by balancing the needs and good of society with the right of an individual to enjoy a good reputation when he has done nothing which ought to injure his reputation. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover statements of disgraceful facts to a master concerning a servant, or one applying for service, the privilege covers a *bona fide* statement on reasonable grounds to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest of society. But if the privilege is to extend to cases like that at bar,

then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with one person only, or a small class of persons, but with every member of the public whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable grounds. We think that not only is a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.

"We are aware that public officers and candidates for public office are often corrupt when it is impossible to make legal proof thereof, and of course it would be well if the public could be informed in such a case of what lies hidden by concealment and perjury from judicial investigation. But the danger that worthy and honorable men may be driven from politics and public service by allowing too great latitude in attacks upon their character, outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men and charges against them are unduly guarded or restricted, and yet the rule complained of is the law in England." (Page 652.)

Here the rule by which privilege is to be measured is correctly stated, as in *Wason v. Walter*, L. R. 4 Q. B. (Eng.) 73—the balance of public good against private hurt. The argument of counsel is then answered, and the statement is made that a candidate ought not suffer a loss in reputation with the whole public for the public good. That is the question to be decided, and not a reason why it should be so decided. Then the sole reason for the decision is stated—that honorable and worthy men will be driven from politics. Then the consequences of the decision are commented upon: Freedom of the press will not be endangered—an assertion, as shown by the manner in which public men are handled by the press at the present time—an appeal to experience for proof.

The single reason upon which the Hallam decision is based is also in the nature of a prediction, and is not new. It was advanced in this country in 1808, by Mr. Chief Justice Parsons (*Commonwealth v. Clap*, 4 Mass. 163),¹ and by Chancellor Walworth in 1829, in the case of *King v. Root*, 4 Wend. (N. Y.) 114.

The Hallam case quotes the Supreme Court of Ohio in opposition to the liberal doctrine, as follows:

"We do not think the doctrine either sound or wholesome. In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy by due course of law, for injury to each, is secured by the same constitutional guaranty,

But see *Commonwealth v. Wardwell*, 136 Mass. 164 (1883).

and the one is no less inviolate than the other. To hold otherwise would, in our judgment, drive reputable men from public positions, and fill their place with others having no regard for their reputation, and thus defeat the object of the rule contended for and overturn the reason upon which it is sought to sustain it." (*The Post Publishing Company v. Moloney*, 50 Ohio St. 71, 89, 33 N. E. 921.)

Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more.² But in measuring the extent of a candidate's profert of character it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles. The other arguments furnished by the Ohio quotation have already been considered. The Hallam case contains nothing further worthy of note.³

² See accord, Cockburn, C. J., in *Seymour v. Butterworth*, 3 F. & F. 372 (1862); President Robertson in *Bruce v. Leisk*, 19 Rettie 482 (Scottish Ct. of Sess. 1892); Cooley, Constitutional Limitations, 440; Van Vechten Veeder, Esq., Freedom of Public Discussion, 23 Harv. L. R. 413 (1910), pp. 429-431, compare *Commonwealth v. Wardwell*, *infra*, Note 3, and *Wood v. Boyle*, 177 Pa. St. 620 (1896); *Broadbent v. Small*, 2 Vict. L. R. Law 121 (1876).

³ Accord: *George v. Goddard*, 2 F. & F. 689 (1861); *Wisdom v. Brown*, 1 T. L. R. 412 (1885); but see *Harwood v. Astley*, 1 B. & P. N. R. 47 (1804); *Bruce v. Leisk*, 19 Rettie 482 (Scottish Ct. of Sess. 1892); *Burke v. Mascarich*, 81 Cal. 302 (1889), *semble*; *Mott v. Dawson*, 46 Iowa 533 (1877); *Bays v. Hunt*, 60 Iowa 251 (1882); *Briggs v. Garrett*, 111 Pa. St. 404 (1886); *Ross v. Ward*, 14 S. Dak. 240 (1901), all cases of private communications between voters as to candidates for office are made at meetings to consider the fitness of such candidates; *Myers v. Longstaff*, 14 S. Dak. 98 (1900); *Boucher v. Clark Publishing Co.*, 14 S. Dak. 72 (1900); *Marks v. Baker*, 28 Minn. 162 (1881); *State v. Ford*, 82 Minn. 452 (1901), *semble*; *Express Printing Co. v. Copeland*, 64 Tex. 354 (1885), but see *Forke v. Homann*, 14 Tex. Civ. App. 670 (1896), similar statements published in newspapers. In *Stuceney v. Baker*, 13 W. Va. 158 (1878), a distinction is drawn between allegations of mental or physical unfitness for the office, which are said to be absolutely privileged and attacks on the candidate's moral character which can only be justified by proof of their truth.

In most of the American cases it is held that the statements must not only be published in good faith for the guidance of voters but there must be reasonable grounds to believe them true and statements based on mere gossip or rumor are not privileged, *Burke v. Mascarich*, 81 Cal. 302 (1889); *State v. Ford*, 82 Minn. 452 (1901), compare *Briggs v. Garrett*, 111 Pa. St. 404 (1886), *contra*, *Bays v. Hunt*, 60 Iowa 251 (1882).

Statements made in town meetings by officers thereof or by taxpayers in regard to the conduct of the town affairs are privileged, *Bradley v. Heath*, 12 Pick. 163 (Mass. 1831); *Smith v. Higgins*, 16 Gray 251 (Mass. 1860); *Bradford v. Clark*, 90 Maine 298 (1897), but see *Dodds v. Henry*, 9 Mass. 262 (1812).

Contra: *Jarman v. Rea*, 137 Cal. 339 (1902); *Dauphiny v. Buhne*, 153 Cal. 757 (1908); *Jones, Varnum & Co. v. Townsend*, 21 Fla. 431 (1885), *semble*; *Rearick v. Wilcox*, 81 Ill. 77 (1876); *Aldrich v. Press Printing Co.*, 9 Minn. 133 (1864); *Bronson v. Bruce*, 59 Mich. 467 (1886); *Wheaton v. Beecher*, 66 Mich. 307 (1887), where, however, the plaintiff was publicly a candidate for an appointive office, (see *Hunt v. Bennett*, 19 N. Y. 173 (1859); though if the object be to inform the electors, "it must reduce the damages to a minimum," *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251 (1879); but see *Sherwood, J. in Peoples v. Detroit Post, etc.*, 54 Mich. 457 (1885); *Smith v. Burrus*, 106 Mo. 94 (1891); *Lewis v. Few*, 5 Johns. 1 (N. Y. 1809); *Upton v. Hume*, 24 Ore. 420 (1893). In *Coffin v. Brown*, 94 Md. 190 (1901),

(c) Communications made for the protection of others.

1. Where a relation exists making it the maker's duty to protect the recipient.

HEMMENS v. HALSTEAD.

Court of Appeals State of New York, 1893. 138 New York Appeal Rep. 517.

Action of slander for statements made by the defendant, who was principal of the Institution for Deaf Mutes at Rome (N. Y.), that the plaintiff, the superintendent of the sewing department whose duty as such was to superintend the making of clothing for the children and instructing a class in sewing, was the author of an obscene anonymous letter received by the defendant's wife. These statements were made to the president of the board of trustees, in the course of a consultation with him in regard to the matter. The trial court directed a verdict for the defendant and entered a judgment thereon and denied a motion for a new trial. This appeal is taken from the judgment of the general term of the Supreme Court of the 4th Judicial Department affirming the action of the trial court.

O'BRIEN, J. The court held that the defense of privilege, contained in the answer, was established and that there was no question for the jury. The General Term has repeatedly reversed judgments in the plaintiff's favor (24 Hun, 395; 36 Hun, 149; 13 State Rep. 211), and has finally affirmed the judgment entered upon the verdict

it was held that a letter to a democratic campaign committee criticizing the republican candidate for governor because of his appointment of the plaintiff, who was accused of election frauds, as election supervisor, was not privileged.

Many courts allow a wide latitude in publishing to the public the official misconducts of public officers, *O'Rourke v. Lewiston Daily Sun Pub. Co.*, 89 Maine 310 (1896); *Evening Post v. Richardson*, 113 Ky. 641 (1902); *Neeb v. Hope*, 111 Pa. St. 145 (1885); *Ferber v. Gazette & Bulletin Pub. Co.*, 212 Pa. St. 367 (1905), or the misconduct of public affairs if published for the purpose of inducing citizens to use their influence to have the abuse remedied, *Palmer v. Concord*, 48 N. H. 211 (1868), and see *Crane v. Waters*, 10 Fed. 619 (1882), where Lowell, C. J. held that the construction and operation of a railroad, though not the value of its securities, was of sufficient public interest to warrant the publication of a supposed scheme to wreck it: *Contra, People v. Fuller*, 238 Ill. 116 (1909); *Foster v. Scripps*, 39 Mich. 376 (1878); *Benton v. State*, 59 N. J. L. 551 (1896); *Banner Publishing Co. v. State*, 16 Lea 176 (Tenn. 1885); *Hamilton v. Eno*, 81 N. Y. 116 (1880); *Ullrich v. New York Press Co.*, 23 Misc. 168 (1898 N. Y.); *Eviston v. Cramer*, 57 Wis. 570 (1883). But statements as to an official's private character which might be privileged if made while he was a candidate, are not privileged if made after his election, *Commonwealth v. Wardwell*, 136 Mass. 164 (1883).

See on the whole subject, especially the confusion between "privilege" and "fair comment" often noticeable in cases discussing libel on public officers and candidates for office, Van Vechten Veeder, Esq., *Freedom of Public Discussion*, 23 Harv. L. R. 413 (1910).

directed against her. There can be no doubt that the occasions upon which the defendant is shown to have made the charge were privileged, the only question being as to its nature and extent. The defendant occupied an important and responsible office under the authority of the state, involving the performance of duties of the most varied and delicate nature, upon the proper discharge of which the efficiency and welfare of the institution largely depended. It was his duty to watch and carefully observe the moral conduct, not only of the children committed to his charge, but even in a greater degree, the teachers, upon whose influence and example so much, for good or evil, depended. It was essential that he should be at liberty to communicate freely with the governing body as to any matter touching the conduct of either the teachers or the pupils. This he could not do if hampered by fear of penalties that could follow errors of judgment or mistakes, as to who was or was not properly chargeable with improper conduct.

If the defendant believed that the plaintiff was the person who sent the letter it was his duty to communicate the fact to the executive committee and the president, all of whom had a corresponding duty with respect to everything that concerned the welfare of the institution, and his statements, under such circumstances, were confidential and privileged until the plaintiff removed the privilege by proof, on her part, of actual, or, as it is sometimes called, express malice or malice in fact. (*Byam v. Collins*, 111 N. Y. 143; *Vandersee v. McGregor*, 12 Wend. 545; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Washburn v. Cooke*, 3 Den. 120; *Hemmens v. Nelson*, 36 Hun, 155; *Moore v. M. N. Bank*, *supra*.)¹

Judgment affirmed.

LEWIS AND HERRICK v. CHAPMAN.

Court of Appeals of the State of New York, 1857. 16 *New York*, 369.

The judge charged the jury that this postscript was libelous, if false, and that unless they should find the matter contained in it

¹ *Accord: Hume v. Marshall*, 42 J. P. 136 (Eng. 1877); *Scarll v. Dixon*, 4 F. & F. 250 (1864); *Sutton v. Plumridge*, 16 L. T. 741 (1867).

So a railway owes a duty to communicate the reasons for discharging an employee to other officials of the same line, *Bacon v. Mich. Cent. R. Co.*, 66 Mich. 166 (1887); *Missouri Pacific R. Co. v. Richmond*, 73 Tex. 568 (1889), or to officials of other roads, *Missouri Pacific R. Co. v. Richmond, semble*; *Denver Public Warehouse Co. v. Holloway*, 34 Colo. 432 (1905), communication by one official of a corporation to another directing the discharge of an employee; *Stace v. Griffith*, L. R. 2 P. C. 420 (1869), commanding officer of a regiment at St. Helena reported to the colonial secretary of the island the supposed drunkenness at a mess dinner of the plaintiff, a master in the government school; *Lally v. Emery*, 54 Hun 517 (N. Y. 1889), statements defamatory of the plaintiff made to his commanding officer by another officer; *Bell v. Parke*, 10 Ir. C. L. R. 279 (1860), per Pigot, C. B., consultation with brother officers as to propriety of reporting plaintiff to the commanding officer; *Livingston v. Bradford*, 115 Mich. 140 (1897), consultation between cashier and bookkeeper of a bank about the theft of

substantially true they must find for the plaintiff; that, so far as malice was necessary to a right of action in this case, it was properly inferable, from the falsity of the words charged in the complaint, as libelous. The defendant excepted to this portion of the charge, and the jury rendered a verdict for the plaintiff for \$750. The Supreme Court, at general term in the seventh district, denied a motion for a new trial, and judgment having been perfected for the plaintiffs, the defendant appealed to this court.

SELDEN, J. The inquiry, then, is whether the circumstances in this case were such as to bring the communication within the class termed privileged.

Where both parties, *i. e.*, the party making as well as the party receiving, have an interest in the communication, it has never been doubted that it was privileged. Where, however, the interest is confined solely to the party receiving, the authorities are not so decided.

But whatever may be the true doctrine on this subject, there is no doubt that where the communication is made *bona fide*, in answer to inquiries from one having an interest in the information sought, or where the relation between the parties by whom and to whom the communication is made is such as to render it reasonable and proper that the information should be given, it will be regarded as privileged. The precise question here is, whether such a relation existed in this case. In *Todd v. Hawkins* (8 Carr. & Pa., 88), it was held that a letter written in good faith by the defendant to his mother-in-law, who was about to marry again, warning her of the bad character of her intended husband, was privileged; and a like decision was made in the case of *Cockayne v. Hodgkisson*, (5 Carr. & Pa., 543), where a tenant of a nobleman had written to inform him of his gamekeeper's neglect of duty. So, too, in this state, in the case of *Washburn v. Cooke* (3 Denio, 110), a communication made by an agent to his principal, in regard to the conduct of a third person connected with the business of the agency, was held to be privileged.

These cases show that all that is necessary to entitle such communications to be regarded as privileged is, that the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of others. Assuming, then, that the defendant made the communication in perfect good faith, as we must upon this question of privilege, is it to be regarded as an act of officiousness, on the part of a banker in the country, intrusted by a mercantile house in New York with the collection of a note, to inform such house of the inability of the maker to meet the note at maturity? It would seem that if the relation of a son-in-law to his mother-in-law, of a tenant to his landlord, and of an ordinary agent to his principal, are sufficient, as

bank funds, compare *Branstetter v. Dorrrough*, 81 Ind. 527 (1882), where statements made in consulting friend, as to the propriety of letting the plaintiff know what was being said about him, were held not privileged.

in the cases just cited, to cause the information to be considered as privileged, that existing in this case must be equally so. It is a matter of the utmost interest to merchants in the city to be able to judge of the responsibility of their customers in the country; and even if they have no right to expect information on the subject from those whom they employ to collect their paper, yet the giving of such information by the person employed, where, as in this case, it relates to the very business with which he is intrusted, can scarcely be considered as officious, or more than an act of just reciprocity.

The communication, therefore, charged in this case as libelous, must be regarded as privileged. The defendant is nevertheless liable if there was any want of good faith in making it; but that question must be passed upon by the jury, and there must be a new trial for that purpose.¹

¹ So, though no litigation is actually going on, a solicitor may give his client any information of apparent value to him, *Browne v. Dunne*, The Reports, Vol. 6, p. 67 (H. L. 1893); *Davis v. Reeves*, 5 Ir. C. L. 79 (1855), and may inform the next friend of his minor client of the latter's conduct prejudicial to his interests in the litigation, *Wright v. Woodgate*, 2 C. M. & R. 573 (1835). So a physician may discuss with a patient the professional character of the druggist who puts up his prescriptions, *Cameron v. Cockran*, 2 Marv. 166 (Del. 1895), see *Humphreys v. Stilwell*, 2 F. & F. 590 (1861), and may state his professional opinion as to his patient's condition to her, even in the presence of her friends asked by her to be present, *Brice v. Curtis*, 38 D. C. App. 304 (1912), though of course he is not privileged to discuss his patients' ailments with others.

So when the plaintiff is in the employment of the defendant or is performing a contract with him, he may give information to the plaintiff's surety, as to any conduct of the plaintiff prejudicial to the surety's interest as such, *Dunman v. Bigg*, 1 Camb. 269 note (1808); *Sunley v. Metropolitan Life Ins. Co.*, 132 Iowa 123 (1906); and see *Ward v. Ward*, 47 W. Va. 766 (1900), statements by surety to creditor, and *Rothholz v. Dunkle*, 53 N. J. L. 438 (1891). In *Schulze v. Jalonick*, 18 Tex. Civ. App. 296 (1898), an insurance agent made ratings of all the property in the neighborhood for the information of his companies, in them he discredited the plaintiff's premises, which were not insured, as being used for the illegal sale of liquor, the transmissions of these ratings to his principals was held privileged.

Where the defendant, who has given the plaintiff a letter of recommendation, or otherwise so acted as to hold him out as trustworthy, honestly believes that he had discovered facts which make such recommendation misleading, it is held to be his moral duty and legal right to communicate to any one who has employed or trusted the plaintiff in reliance on it, *Dixon v. Parsons*, 1 F. & F. 24 (1858); *Fowles v. Bowen*, 30 N. Y. 20 (1864); *Butterworth v. Conrow*, 1 Marv. 361 (Del. 1895), and see *Fahr v. Hayes*, 50 N. J. L. 275 (1888).

An employer is in duty bound to tell a servant the reason for his discharge, *Taylor v. Hawkins*, 16 Q. B. 308 (1851); *R. v. Perry*, 15 Cox C. C. 169 (1883); and if the offense was believed to have been committed by two jointly, he may tell each of it, though it necessarily involves the other, *Manby v. Witt*, *Eastmead v. Witt*, 18 C. B. 544 (1856), but see *Moore v. Manufacturers Nat'l. Bank*, 123 N. Y. 420 (1890), *contra*, O'Brien, J., *dissenting*.

An employer of minor or female servants owes their parents, or those standing to them *in loco parentis*, the duty of acquainting them with such servant's misconduct, whether it leads to dismissal or not, *James v. Jolly*, cited in Odger's Libel and Slander, 4th ed., p. 286; *Aberdeen v. Macleay*, 9 Times L. R. 539 (1893); *Gorst v. Barr*, 13 Ont. 644 (1887); *Livingston v. Bradford*, 115 Mich. 140 (1897); but not it seems to inform a wife of the

MACINTOSH v. DUN.

*Judicial Committee of the Privy Council, House of Lords, 1908.
1908 Law Reports, Appeal Cases, 390.*

LORD MACNAGHTEN. This is an appeal from the decision of the High Court of Australia pronounced on cross-appeals from two orders of the Full Court of New South Wales.

The action was an action for libel. It was tried before Cohen J. and a jury. The plaintiffs obtained a verdict for £800. The Full Court set the verdict aside, but directed a new trial. The High Court entered judgment for the defendants.

The question, and the only question on the present appeal, is whether the occasion on which the libels were published was or was not a privileged occasion.

The plaintiffs are wholesale and retail ironmongers in Sydney. The defendants (as their acting manager in Sydney stated in an affidavit filed in the action) carry on the business of a trade protective society "in almost all parts of the civilized world" under the name of "The Mercantile Agency." That business, as the acting manager explained, "consists in obtaining information with reference to the commercial standing and position of persons" in the State of New South Wales "and elsewhere and in communicating such information confidentially to subscribers to the agency in response to specific and confidential inquiry on their part."¹

(He then quotes the oft-quoted passage from the opinion of Parke, B., in *Toogood v. Spyring*, 1 C. M. & R. 181, at p. 193.²)

That passage, which, as Lindley L. J. observes,³ is frequently cited, and "always with approval," not only defines the occasion that protects a communication otherwise actionable, but enunciates the

cause of her husband's dismissal from his employment. *Jones v. Williams*, 1 Times L. R. 572 (1885), but compare *Wells v. Lindop*, 15 Ont. App. 695 (1888).

¹ He stated further that all requests for information directed to the agency by their subscribers are in the following form:

"Subscriber's Ticket.
"The Mercantile Agency.
"R. G. Dun and Co.
"Established 1841.

"Give us in confidence and for our exclusive use and benefit in our business, viz., that of aiding us to determine the propriety of giving credit, whatever information you have, respecting the standing, responsibility, etc., of—

"Name
"Business
"Town
"Street Address
"State
"Subscribers to sign the above themselves.

"Sydney, "Subscriber,
"190.. per.....
"No.

² This passage is quoted in the opinion in *Gilbert v. Gassett*, ante.

³ *Stuart v. Bell*, L. R. 1891, 2 Q. B. 341, p. 346.

principle on which the protection is founded. The underlying principle is "the common convenience and welfare of society"—not the convenience of individuals or the convenience of a class, but, to use the words of Erle C. J. in *Whiteley v. Adams*, 15 C. B. (N. S.) 392, at p. 418, "the general interest of society."⁴

Communications injurious to the character of another may be made in answer to inquiry or may be volunteered. If the communication be made in the legitimate defence of a person's own interest, or plainly under a sense of duty such as would be "recognized by English people of ordinary intelligence and moral principle" to borrow again the language of Lindley L. J.,⁵ it cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstance that the information is volunteered is an element for consideration certainly not without some importance.

If in defence, therefore, to the views of the learned judges of the High Court, the first question would seem to be, under which category does the communication now in question properly fall? No doubt there was a specific request. In response to that request the communication was made. That much is clear. But it is equally clear that the defendants set themselves in motion and formulated and invited the request in answer to which the information complained of was produced. The defendants, in fact, hold themselves out as collectors of information about other people which they are ready to sell to their customers. It cannot matter whether the customer deals across the counter, so to speak, just as and when the occasion arises, or whether he enjoys the privilege of being enrolled as a subscriber and pays the fee in advance.

If, then, the proprietors of the Mercantile Agency are to be regarded as volunteers in supplying the information which they profess to have at their disposal, what is their motive? Is it a sense of duty? Certainly not. It is a matter of business with them. Their motive is self-interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit.

Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence, or from a bona fide sense of duty, should be extended to

⁴ In *Elkington v. London Association for the Protection of Trade*, 28 T. L. R. 117 (1911), Darling, J., understanding this to mean that the information must be "published for the benefit of society at large" and not for the benefit or convenience of individuals or "a limited class," held that an association of traders issuing a report for the information of its members and not for profit, were not privileged to publish therein imputations on the solvency of customers, *accord*, Lord Alverstone, C. J., in *Greenlands v. Wilmhurst*, 29 L. T. R. 64 (1912), affirmed in the Court of Appeals, L. R. 1913, 3 K. B. 507, Bray, J., dissenting; *contra*, *Barr v. Musselburgh Merchants' Association*, 1912 Session Cases 174 (Scotland Ct. of Sessions), and *Howe v. Lees*, 11 Commonwealth L. R. 361 (Australia 1910).

⁵ L. R. 1891, 2 Q. B., p. 350.

communications made from motives of self-interest by persons who trade for profit in the characters of other people? The trade is a peculiar one; still there seems to be much competition for it; and in this trade, as in most others, success will attend the exertions of those who give the best value for money and probe most thoroughly the matter placed in their hands. There is no reason to suppose that the defendants generally have acted otherwise than cautiously and discreetly. But information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed by disloyal employees. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law.

However convenient it may be to a trader to know all the secrets of his neighbor's position, his "standing," his "responsibility," and whatever else may be comprehended under the expression "et cetera," yet, even so, accuracy of information may be bought too dearly—at least for the good of society in general.

It is admitted that in this country there is no authority directly in point. There are direct authorities in the United States in favor of the conclusion of which the High Court has arrived. American authorities are, no doubt, entitled to the highest respect. But this is a question which must be decided by English law. In the dearth of English authority it seems to their Lordships that recourse must be had to the principle on which the law in England on this subject is founded. With the utmost deference to the learned judges of the High Court, their Lordships are of opinion that the decision under appeal is not in accordance with that principle.^a

^a *Accord*: *Johnson v. Bradstreet Co.*, 77 Ga. 172 (1886), "If one makes it his business to pry into the affairs of another, in order to coin money for his investigations and information, he must see to it that he communicate nothing that is false"; and see *Beardsley v. Tappan*, 5 Blatchf. 497 (U. S. 1867), confining the privilege of making such communication to individuals, and denying it to a society, association, or a corporation.

Contra: *Erber v. Dun*, 4 McCrary (U. S.) 160, 12 Fed. 526 (1882); *Pol-lasky v. Minchener*, 81 Mich. 280 (1890); *King v. Patterson*, 49 N. J. L. 417 (1887); *Ormsby v. Douglas*, 37 N. Y. 477 (1868); *Commonwealth v. Stacey*, 8 Phila. 617 (Pa. 1871); *Bradstreet Co. v. Gill*, 72 Tex. 115 (1888); *State ex rel. Lanning v. Lonsdale*, 48 Wis. 348 (1880); *Todd v. Dun*, 15 Ont. App. 85 (1887); *Fitzsimons v. Duncan, Kemp & Co.*, L. R. 1908, 2 Ir. 483 (*semble*). The same privilege attaches to the communications by the correspondents of such agencies to them of information from which their reports are made up, *State ex rel. Lanning v. Lonsdale*, *supra*; *contra*, *Sherwood v. Gilbert*, 2 Alb. L. J. 323 (N. Y. 1870). See on the whole subject the learned and exhaustive essay of Hon. Jeremiah Smith, 14 Col. L. R. 187-296 (1913) and note in 57 U. of Pa. L. Rev. 179.

2. Where no relation exists making it peculiarly the duty of the maker to protect the recipient's interests.

(a) Communication made in answer to inquiries.

RUDE v. NASS.

Supreme Court of Wisconsin, 1891. 79 Wisconsin Reports, 321.

The father of a girl, who had caused the plaintiff's arrest for her seduction, requested a friend to write to the defendant, pastor of a church with which the plaintiff had previously been connected. The defendant in answer, wrote the letter in question, which was admittedly libelous.

CASSODAY, J. Counsel contend, in effect, that, assuming, as we must, upon the verdict, that the defendant wrote and sent the letter believing it to be true, in good faith, and without malice, yet the circumstances were not such as to make it privileged. They contend that, in order to be privileged, the defendant should have had an interest in the subject-matter of the letter, or some duty to perform in reference thereto, and also that the person to whom it was addressed should have had a corresponding interest or duty; and they cite decisions of learned courts in support of such contention. Some of these decisions, however, are inconsistent with others made by the same courts.

In *Noonan v. Orton*, 32 Wis 112, Dixon, C. J., approvingly quotes the language of Shaw, C. J., as follows: "Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, *or* where they are spoken in good faith to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained in such cases without proof of express malice." *Bradley v. Heath*, 12 Pick. 164. These cases were cited approvingly in *M. P. Ry. Co. v. Richmond*, 73 Tex. 575. This alternative statement only makes it necessary that there be an interest or duty on the part of the person making the communication, or on the part of the person to whom it is made, in order that it is to be conditionally privileged. There are certainly many cases holding that such communication may be conditionally privileged if made to one having an interest in and a right to know and act upon the facts therein stated. *Weatherston v. Hawkins*, 1 Term. Rep. 110; *Twogood v. Spyring*, 1 Cromp. M. & R. 181; *Kine v. Sewell*, 3 Mees. & W. 297; *Robshaw v. Smith*, 38 Law T. (N. S.) 423; *Waller v. Lock*, 45 Law T. (N. S.) 242; *Tompson v. Dashwood*, L. R. 11 Q. B. Div. 43; *Atwill v. Mackintosh*, 120 Mass. 177;

Sunderlin v. Bradstreet, 46 N. Y. 191; *Bacon v. M. C. R. Co.*, 66 Mich. 166.

Thus in *Robshaw v. Smith*, *supra*, it was said by Grove, J., speaking for the court: "The defendant did not act as a volunteer, but was applied to for information. When applied to, he did give such information as he possessed. He might have refused to give that information. He had no legal duty cast upon him to give any opinion. But he was entitled to give his opinion when asked, and, *a fortiori*, as it seems to me, to show any letters he had received bearing on the subject. . . . Every one owes it as a duty to his fellow-men to state what he knows about a person, when inquiry is made; otherwise no one would be able to discern honest men from dishonest men. It is highly desirable, therefore, that a privilege of this sort should be maintained." Lindley, J., was of the same opinion, and said: "I think it would be a lamentable state of the law, if, when a person asks another for information, that other could not give such information as he possessed without exposing himself to the risk of an action." Upon a review of the authorities, that case and these expressions were fully sanctioned by Jessel, M. R., in *Waller v. Lock*, *supra*, who went still further, and said: "If the answer is given in the discharge of a moral and social duty, or if the person who gives it believes it to be so,¹ that is enough. It need not even be an answer to an inquiry, but the communication may be a voluntary one. The law is concisely stated by Lord Blackburn. . . . thus: 'Where a person is so situated that it becomes right in the interests of society that he should tell to a third person facts, then, if he *bona fide* and without malice does tell them, it is a privileged communication.' It appears to me, that if you ask a question of a person whom you believe to have the means of knowledge about the character of another person with whom you wish to have any dealings whatever, and he answers *bona fide*, that is a privileged communication. I might illustrate this by the instances of inquiries being made of a friend or a neighbor about a tradesman, a doctor, or a solicitor. Society could not go on without such inquiries. The whole doctrine of privilege must rest upon the interest and the necessities of society. If every one was open to an action of libel or slander for the answers he might make to such inquiries, it would be very injurious to the interests of society." The eminence of that late learned master of the rolls, who thus expressed the opinion of the court, and the confusion among some of the adjudications, seem to justify the lengthy quotation made.

In view of these authorities, and others which might be cited, it seems to us that the father of the girl who made the complaint upon which the plaintiff had been arrested had an interest in the communication sent by the defendant, and had the right to know and act upon the facts therein stated; and hence, had the letter been written by the defendant in answer to inquiries made by the father

¹ As to this see Lindley, L. J. in *Stuart v. Bell*, 1891, L. R. 2 Q. B. 341, p. 349, *contra*.

personally, it would have been conditionally privileged. The mere fact that the letter was written by the defendant in answer to inquiries made by another for and in behalf of the father does not take away the privileged character of the communication. This is manifest from some of the authorities cited. We must hold that there was no error in submitting the case to the jury on the theory that the communication was conditionally privileged.²

BYAM v. COLLINS.

Court of Appeals State of New York, 1888. 111 New York, 143.

EARL, J. There was, also, error in the court below as to the verbal slanders alleged in the second cause of action; and what I have already said applies, in part, to these slanders.

² *Accord*: Defamatory statements made in answer to inquiries, as to the character of a servant or employee, made by one to whom the latter has applied for employment, *Edmondson v. Stephenson*, Buller, N. P. 8 (1765); *Wabash R. Co. v. Young*, 162 Ind. 102 (1904); *Posnett v. Marble*, 62 Vt. 481 (1889); or made by one servant of another in answer to his mistress' questions, *Mead v. Hughes*, 7 Times L. R. 291 (1891), or by third parties, *Cockayne v. Hodgkisson*, 5 C. & P. 543 (1833), or made to landlord in answer to his inquiries as to the character of his tenants, *Liddle v. Hodges*, 15 N. Y. Super. Ct. (2 Bosw.) 537 (1858), or by a physician reporting to a husband his belief that the latter's wife is insane, *Weldon v. Winslow*, London Times, March 14 to 19 (1884), or statements as to character of a girl's fiancé made in answer to the inquiries by her family, *Buisson v. Huard*, 106 La. 768 (1901), or statements as to the character of a minor child made in answer to its parents' inquiry, *Long v. Peters*, 47 Iowa 239 (1877), are privileged.

So one is privileged to answer questions put by another in the course of his investigation of a crime actually or honestly believed to exist, per Parke B., *Kine v. Sewell*, 3 M. & W. 297 (1838), p. 302.

So when a man on being asked for his reason for refusing to sign the plaintiff's petition to retain his position as trustee of a charity, on being pressed gave them, his answer was held in *Cowles v. Potts*, 34 L. J. Q. B. 247 (1865) to be privileged, compare *Whiteley v. Adams*, 15 C. B. (N. S.) 392 (1863).

So replies to inquiries as to the solvency or respectability of a person with whom the inquirer has or is about to have business or professional dealings, Lord Denman in *Storey v. Challands*, 8 C. & P. 234 (1837); *Bromage v. Prosser*, 1 C. & P. 475 (1824); *Robshaw v. Smith*, cited in the principal case, in which even the showing of an anonymous letter was held privileged; *Fahr v. Hayes*, 50 N. J. L. 275 (1888); *Howland v. Blake Mfg. Co.*, 156 Mass. 543 (1892). For other cases, see Odgers, Libel and Slander, 4th Ed., pp. 238 to 242.

One specifically employed to obtain information is privileged to state the facts he believes he has discovered, *Atwill v. MackIntosh*, 120 Mass. 177 (1876), agent employed by a father to obtain information as to the character of his daughter's suitor; *Zuckerman v. Sonnenschein*, 62 Ill. 115 (1871), interpreter translating slanderous words; *Washburn v. Cooke*, 3 Denio 110 (N. Y. 1846), law student employed by sheriff to ascertain facts and advise him what course to take; *Taylor v. Church*, 8 N. Y. 452 (1853), agent employed by association of merchants to ascertain the credit of their customers, see *McIntosh v. Dun*, *post*. But the statement must be responsive to the inquiry, *Southam v. Allen*, T. Raym. 231 (1673), *Huntley v. Ward*, 6 C. B. (N. S.) 514 (1859); Odger's Libel and Slander, 4th Ed., 239.

The judge charged the jury, in substance, that the words, if uttered under the circumstances testified to by Mrs. Collins, were privileged. She testified, in substance, that she uttered the words to Mr. Cameron in confidence, after the most urgent solicitation on his part that she should tell him what she knew about the plaintiff. But defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. She was under no duty to utter them to him, and she had no interest to subserve by uttering them. He had no interest or duty to hear the defamatory words, and had no right to demand that he might hear them; and under such circumstances there is no authority holding that any privilege attaches to such communication.¹

There was no evidence that would authorize a jury to find that Cameron sought the interview with Mrs. Collins, as an emissary from or agent of the plaintiff, or that at the plaintiff's solicitation or instigation he obtained the slanderous communications from her, and he did not profess or assume to act for him on that occasion. He was the mutual friend of the parties,² and seems to have sought

¹ *Accord: Carpenter v. Willey*, 65 Vt. 168 (1892), a former pastor has no legitimate interest in, nor right to inquire into the chastity of a female member of his former congregation, so statements concerning her chastity are not privileged though made in answer to his pressing inquiries. So, when the occasion for information is passed, so that the recipient's interest, or the common interest of both giver and recipient therein no longer exists, the information can neither be given upon inquiry, *Martin v. Strong*, 5 A. & E. 535 (1836), as explained in *Kine v. Sewell*, 3 M. & W. 297 (1838), pp. 303 and 314; *Ritchie v. Widdemer*, 59 N. J. L. 290 (1896)—but compare *Kersting v. White*, 107 Mo. App. 265 (1904), where the defamatory remarks were volunteered in discussing what had taken place at a church meeting where charges against the plaintiff had been considered and dismissed—nor volunteered, *Brooks v. Blanshard*, 1 Cr. & M. 779 (1833), one stockholder discussed with another the character of an applicant for a position in the service of the corporation, which had already been filled; *Goslett v. Garment*, 13 Times L. R. 391 (1897), defendant informed a headmaster that the plaintiff, formerly a teacher in his school, had been seen drunk in the street on a Sunday while he was a teacher in the school.

So while a director may in the board of directors state his belief that a customer of a corporation is insolvent or perhaps may do so in discussing the business affairs of the corporation, he may not gossip with a fellow-director in regard to the solvency of a mutual acquaintance, *Sewall v. Catlin*, 3 Wend. 291 (N. Y. 1829).

² Mere benevolent interest in the person, who is the subject of the statements is not enough, *The Norfolk & Washington Steamboat Co. v. Davis*, 12 D. C. App. 306 (1898), a statement affecting the plaintiff's character held not privileged because made to a man who had taken an interest in the plaintiff's career and had recommended him for the position he then held; compare *Farquhar v. Neish*, 17 Sc. Sess. Cases, 4th Ser. 716 (1890), where a similar statement made to a registry office, through which the defendant had engaged the plaintiff as a servant, was held privileged.

Nor does mere joint membership in a religious organization, social or business association, give the members an interest in the characters of their associates which makes a discussion thereof privileged, *York v. Johnson*, 116 Mass. 482 (1875); *Lovejoy v. Whitcomb*, 174 Mass. 586 (1899); as to the right to discuss within the family circle matters which, since they touch the social, moral or business interests of one are of interest to all,

the interview with her either to gratify his curiosity, or to prevent the impending litigation between the parties. But even if he obtained the interview with her at the solicitation of the plaintiff, and as his friend, she could not claim that her slanderous words uttered at such interview were privileged.⁸

The trial judge, therefore, erred in refusing to charge the jury that there was no question for them as to the second cause of action but one of damages.

(b) Communication volunteered by the maker.

COXHEAD v. RICHARDS.

Court of Common Pleas, 1846. 2 Common Bench Reports, 568.

TINDAL, C. J. This was an action upon the case for the publication of a false and malicious libel, in the form of a letter written by one John Cass, the first mate of a ship called *The England*, to the defendant; the letter stating that the plaintiff, who was the captain of the ship, and then in command of her, had been in a state of constant drunkenness during the part of a voyage, whereby the ship and crew had been exposed to continual danger: and the publication by the defendant was the communication by him of this letter to the owner of the ship, by reason whereof,—which was the special damage alleged in the declaration—the plaintiff was dismissed from the ship and lost his employment.¹

The defendant pleaded not guilty.

A verdict was found for the defendant upon the first issue.

I told the jury at the trial, that the occasion and circumstances under which the communication of this letter took place, were such, as in my opinion, to furnish a legal excuse for making the communication; and that the inference of malice,—which the law, *prima facie*, draws from the bare act of publishing any statements false in fact, containing matter to the reproach and prejudice of another,—was thereby rebutted; and that the plaintiff, to entitle himself to a verdict, must show malice in fact: concluding by telling them that they should find their verdict for the defendant, if they thought the communication was strictly honest on his part, and made solely in the execution of what he believed to be a duty; but, for the plaintiff, if they thought the communication was made from any indirect motive whatever, or from any malice against the plaintiff. And the only question now before us, is, whether, upon the evidence given at the trial, such direction was right.

There was no evidence whatever that the defendant was actuated by any sinister motive in communicating the letter to Mr.

see *McBride v. Ledoux*, and *Campbell v. Bannister*, cited in Note 2 to *Krebs v. Oliver*, *post*.

⁸ See *Richardson v. Gunby*, *ante*.

¹ The other pleas were 2nd, that the charge was true, and 3rd, that the plaintiff was not discharged in consequence of the letter—on both issues the verdict was found for the defendant.

Ward, the ship-owner: on the contrary, all the evidence went to prove that what he did, he did under the full belief that he was performing a duty, however mistaken he might be as to the existence of such duty, or in his mode of performing it. The writer of the letter was no stranger to the defendant: on the contrary, both were proved to have been on terms of friendship with each other for some years; and, from the tenor of the letter itself, it must be inferred the defendant was a person upon whose judgment the writer of the letter placed great reliance, the letter itself being written for the professed purpose of obtaining his advice how to act under a very pressing difficulty. The letter was framed in very artful terms, such as were calculated to induce the most wary and prudent man (knowing the writer) to place reliance on the truth of its details: and there can be no doubt but that the defendant did in fact thoroughly believe the contents to be true, amongst other things, that the ship, of which Mr. Ward was the owner, and the crew and cargo on board the same, had been exposed to very imminent risk, by the continued intoxication of the captain, on the voyage from the French coast to Llanelly, where the ship then was, and that the voyage to the Eastern Seas, for which the ship was chartered, would be continually exposed to the same hazard, if the vessel should continue under his command. In this state of facts, after the letter had been a few days in his hands, the defendant considered it to be his duty to communicate its contents to Mr. Ward, whose interests were so nearly concerned in the information; not communicating it to the public, but to Mr. Ward; and not accompanying such disclosure with any directions or advice, but merely putting him in possession of the facts stated in the letter, that he might be in a condition to investigate the truth, and take such steps as prudence and justice to the parties concerned required: in making which disclosure he did not act hastily or unadvisedly, but consulted two persons well qualified to give good advice on such an emergency—the one, an Elder Brother of the Trinity House—the other, one of the most eminent ship-owners in London: in conformity with whose advice he gave up the letter to the owner of the ship. At the same time, if the defendant took a course which was not justifiable in point of law, although it proceeded from an error in judgment only, not of intention, still it is undoubtedly he, and not the plaintiff, who must suffer for such error.

The only question is, whether the case does or does not fall within the principle, well recognized and established in the law, relating to privileged or confidential communications; and, in determining this question, two points may, as I conceive, be considered as settled—first, that if the defendant had had any personal interest in the subject-matter to which the letter related, as, if he had been a part-owner of the ship, or an underwriter on the ship, or had had any property on board, the communication of such letter to Mr. Ward would have fallen clearly within the rule relating to excusable publications—and, secondly, that if the danger disclosed by the letter, either to the ship or the cargo, or the ship's company, had

been so immediate as that the disclosure to the shipowner was necessary to avert such danger, then, upon the ground of social duty, by which every man is bound to his neighbor, the defendant would have been not only justified in making the disclosure but would have been *bound* to make it. A man who received a letter informing him that his neighbor's house would be plundered or burnt on the night following by A. and B., and which he himself believed, and had reason to believe to be true, would be justified in showing that letter to the owner of the house, though it should turn out to be a false accusation of A. and B. The question before us appears, therefore, to be narrowed to the consideration of the facts which bear upon these two particular qualifications and restrictions of the general principle.

As to the first, I do not find the rule of law is so narrowed and restricted by any authority, that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief, and with reasonable grounds for the belief that it is true, will not be excused, though he has no personal interest in the subject-matter. Such a restriction would surely operate as a great restraint upon the performance of the various social duties by which men are bound to each other, and by which society is kept up.

The rule appears to have been correctly laid down by the Court of Exchequer,² that, "if fairly warranted by any reasonable occasion of exigency, and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them, within any narrow limits." In the present case, the defendant stood in a different situation from any other person; he was the only person in the world who had received the letter, or was acquainted with the information contained in it. He cannot, therefore, properly be treated as a complete stranger to the subject-matter of inquiry,³ even if the rule excluded strangers from the privilege.

Upon the second ground of qualification—was the danger sufficiently imminent to justify the communication—it is true, that the letter, which came to the defendant's hands about the 14th of December, contains within it the information that the ship cannot get out of harbor before the end of the month. It was urged that the defendant, instead of communicating the letter to the owner, might have instituted some inquiry himself. But it is to be observed that every day the ship remained under the command of such a person as the plaintiff was described to be, the ship and crew continued exposed to hazard, though not so great hazard as when at sea; not to mention the immediate injury to the ship-owner which must nec-

²In *Toogood v. Spring*, 1 C. M. & R. 181.

³The reporter appends this note, "He did not cease to be a stranger in point of *interest*, by ceasing to be a stranger in point of *knowledge*," he then says, "*Quære*, whether the defendant would have once more become a stranger to the subject matter of enquiry upon ceasing to be the *sole* depositary of the information?"

essarily follow from want of discipline of the crew, and the bad example of such a master. And, after all, it would be too much to say, that, even if the thing had been practicable, any duty was cast upon *the defendant*, to lay out his time or money in the investigation of the charge.

Upon the consideration of the case, I think it was the duty of the defendant not to keep the knowledge he gained by this letter himself, and thereby make himself responsible, in conscience, if his neglect of the warnings of the letter brought destruction upon the ship or crew—that a prudent and reasonable man would have done the same; that the disclosure was made, not publicly, but privately to the owner, that is, to the person who of all the world was the best qualified, both from his interest in the subject-matter, and his knowledge of his own officers, to form the most just conclusion as to its truth, and to adopt the most proper and effective measures to avert the danger; after which disclosure, not the defendant, but the owner, became liable to the plaintiff, if the owner took steps which were not justifiable; as, by unjustly dismissing him from his employment, if the letter was untrue. And, as all this was done with entire honesty of purpose, and in the full belief of the truth of the information,—and that, a reasonable belief,—I am still of the same opinion which I entertained at the trial, that this case ranges itself within the pale of privileged communication, and that the action is not maintainable.

I therefore think the rule for setting aside the verdict and for a new trial, should be discharged.⁴

⁴The opinions of Tindal, C. J. and Erle, J. have been expressly approved by Willes, J. in *Amann v. Damm*, 8 C. B. (N. S.) 597 (1860), where, however, the defendant had a personal interest to protect, and Lindley, C. J., in *Stuart v. Bell*, L. R. 1891, 2 Q. B. 341, p. 347, and in many later English cases statements volunteered by one having no personal interest at stake and standing in no family or other relation raising any exceptional duty to the recipient and made wholly to protect the latter's interests have been held privileged, *Dixon v. Smith*, 26 L. J. Ex. 125 (1860), p. 126, one Dawes having told the defendant that he intended to engage the plaintiff to attend his wife's confinement, the defendant advised him not to do so, on account of the plaintiff's immorality; *Davies v. Snead*, L. R. 5 Q. B. 608 (1870), the defendant told the rector of his parish of a report current therein, that he and the plaintiff, his solicitor, were grossly mismanaging a trust fund and defrauding widows and orphans; *Clark v. Molyneux*, L. R. 3 Q. B. D. 237 (1877), rector of one parish informed the rector of another of rumors affecting the character of the plaintiff, the latter's curate; *Waller v. Lock*, L. R. 7 Q. B. Div. 619 (1881). on the request of one lady, interested in the plaintiff, a "decayed gentlewoman," the defendant, the secretary of a charity society, investigated her case and made an unfavorable report which he gave to the lady, giving her permission to show it to a friend, who was also interested in the plaintiff but who had made no inquiries of the defendant's society; *Stuart v. Bell*, L. R. 1891, 2 Q. B. 341, the defendant, the Mayor of Newcastle and the host of the plaintiff's master, showed the latter a letter received from the police of Edinburgh through the police of Newcastle, to the effect that the plaintiff was suspected of theft at that place; the defendant had no personal interest in the plaintiff's honesty as he was leaving that day with his master; see also *James v. Boston*, 2 C. & K. 4 (1845), with which compare *Mott v. Dawson*, 46 Iowa, 533 (1877), where the servant of a vendor after a sale, informed the vendee that he had been cheated;

COLTMAN, J. It has been generally held, and, in my judgment, rightly held, that the question whether a communication is privileged or not, is a question of law for the judge; but, in considering the question whether a communication is privileged or not, the condition necessary to make it privileged, must be assumed. The question of law is, whether, assuming that the defendant really and *bona fide* believed the contents of the letter to be true, the occasion was such as justified the making of the communication; in other words, according to the rule laid down by the Court of Exchequer in *Too-good v. Spyring*, where there was any duty, public or private, legal or moral, calling on the defendant to make the communication complained of. It cannot, I think, be said that there was any legal duty; was there any moral duty, calling on him to make it?

The necessity which exists in the transactions of society, for free inquiry, and for facilities in obtaining information for the guidance of persons engaged in important matters of business, has so far prevailed, that it has been established as a rule, that, for words spoken confidentially upon advice asked, no action lies, unless express malice can be proved: *Bromage v. Prosser*. The duty which may be supposed to exist, to give advice faithfully to those who are in want of it, has been allowed to prevail for the sake of the general convenience of business, though with some disregard of the equally important rule of morality, that a man should not speak ill, falsely, of his neighbor. Even though the statement be not on advice asked, but is made voluntarily, that circumstance was said, in *Pattison v. Jones*, not necessarily to prevent the statement from being considered as privileged. Assuming, then, upon the authority of that case, that the circumstances of the communication being vol-

Hollenbeck v. Ristine, 105 Iowa 488 (1898), 114 Iowa 358 (1901), statements to plaintiff's employer; *Hart v. Reed*, 1 B. Monr. 166 (Ky. 1840), defendant communicated to a third person certain rumors casting suspicion on the plaintiff, with the request that he would look into them and give such information as he thought best to the employer whom the defendant did not know personally, this was held privileged as being for the protection of the interests of both employer, if the plaintiff were guilty, and of the plaintiff, if the rumors were unfounded, since he, knowing them, could meet and disprove them; *Fresh v. Cutter*, 73 Md. 87 (1890), statements by former employer of plaintiff to the latter's present employer; and see *Dale v. Harris*, 109 Mass. 193 (1872), where such statements were held privileged if made to a friend, who was "talking of employing the plaintiff"; *Morton v. Knipe*, 112 N. Y. S. 451 (1908), information to landlord as to character of his tenant; *Noonan v. Orton*, 32 Wis. 106 (1873), and *Hubbard v. Rutledge*, 57 Miss. 7 (1879), defendants reported to insurance company their belief that the plaintiff had himself set fire to their houses insured by the company.

It is generally held that a stranger, neither the child's employer, teacher, pastor, nor a member of its family, can inform the child's parent, voluntarily or on the latter's request, of the child's criminal or wrongful conduct, *Peacock v. Reynal*, 2 Brownlow & Goldsborough 151 (1612), "this is only reformatory," *Lightbody v. Gordon*, 9 Sc. Sess. Cases, 4th Series, 934 (1882); *Moore v. Butler*, 48 N. H. 161 (1868); *Long v. Peters*, 47 Iowa 239 (1877), in some of the cases the communication is also privileged because made not only out of duty to the parent but for the protection of the informant, the victim of the child's wrong.

untary, is no insuperable bar to its being regarded as a privileged communication, we return to the consideration of the question, whether there was any moral duty, binding on the defendant, to make the communication now in question. And, on the best consideration I can give the subject, I think the duty was plainly the other way. The duty of not slandering your neighbour on insufficient grounds, is so clear, that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity.

In the present case, the occasion was in no respect urgent. The vessel was not to sail till the end of the month. There was abundant time for the defendant to write to the mate, and for the mate to act as he should be advised; or for the defendant to take any other steps to ascertain the truth of the statement, before he communicated it in a quarter where it was likely to be productive of so much injury to the plaintiff. It appears to me, therefore, that the communication ought not to be considered as being privileged, and that its being made *bona fide* did not entitle the defendant to a verdict: and, with the greater deference to those who differ from me, and whose opinions are entitled to much more weight than that which I have formed, I think it my duty to state my own.

CRESWELL, J. There is no doubt that the letter published by the defendant of the plaintiff, was defamatory; and the truth of its contents could not be proved. The plaintiff was, therefore, entitled to maintain an action against the publisher of that letter, unless the occasion on which it was published made the publication of such letter a lawful act, as far as the plaintiff was concerned, if done in good faith, and without actual malice. To sustain an action for libel or slander, the plaintiff must show that it was malicious; but every unauthorized publication of defamatory matter is, in point of law, to be considered as malicious. The law, however, on a principle of policy and convenience, authorizes many communications, although they affect the characters of individuals; and I take it to be a question of law, whether the communication is authorized or not. If it be authorized, the legal presumption of malice arising from the unauthorized publication of defamatory matter, fails, and the plaintiff, to sustain his action, must prove actual malice, or, as it is usually expressed, malice in fact. In the present case, the existence of malice in fact was negatived by the jury; and if my lord was right in telling them, that, in the absence of malice in fact, the publication of the letter was privileged, this rule should be discharged. It therefore becomes necessary to inquire within what limits and boundaries the law authorizes the publication of defamatory matter. Perhaps the best description of those limits and boundaries that can be given in a few words, is to be found in the judgment of Parke, B., in *Toogood v. Spyring*: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." It was not contended in this case that any *legal* duty

bound the defendant to communicate to the ship-owner the contents of the letter he had received, nor was the communication made in the conduct of his own affairs, nor was his interest concerned: the authority for the publication, if any, must therefore be derived from some *moral* duty, public or private, which it was incumbent upon him to discharge. I think it is impossible to say that the defendant was called upon by any *public duty* to make the communication; neither his own situation nor that of any of the parties concerned, nor the interests at stake, were such as to affect the public weal. Was there then any *private duty*? There was no relation of principal and agent between the ship-owner and the defendant, nor was any trust or confidence reposed by the former in the latter; there was no relationship or intimacy between them; no inquiries had been made; they were, until the time in question, strangers; the duty, if it existed at all as between them, must, therefore, have arisen from the mere circumstance of their being fellow-subjects of the realm.⁵ But the same relation existed between the defendant and the plaintiff. If the property of the ship-owner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not *know* to be true, was quite as strong as the duty to communicate to the ship-owner that which he believed to be true. Was, then, the defendant bound by any moral duty toward the writer of the letter, to make the communication? Surely not. If the captain had misconducted himself, the mate was capable of observing it, and was as capable of communicating it to the owner as to the defendant. The crew were, in like manner, capable of observing and acting for themselves. The mate (if he really believed that which he wrote to be true) might, indeed, be under a moral duty to communicate it to his owner: but the defendant had no right to take that vicarious duty upon himself: he was not requested by the mate to do so, but was, on the contrary, enjoined *not* to make the communication.

I will not attempt to comment upon the very numerous cases that were quoted at the bar on the one side and on the other, but will advert to one or two which tend to explain the term "moral

⁵In *Vanspike v. Cleyson*, Cro. Eliz. 541 (1596), unsolicited advice given by the defendant to one Dudley, a fellow merchant, to call in a loan made by the latter to the plaintiff, adding, "you had best not trust him," was held not to be "any slander but good counsel to Dudley"; but see *Parson Prick's Case*, post.

In *Herver v. Dowson*, Buller N. P. 8 (1764), unsolicited advice as to the plaintiff's solvency spoken in "confidence and warning" was held privileged; and see *Picton v. Jackman*, 4 C. & P. 257 (1830).

Except for the dictum of Lord Mansfield in *Lowry v. Aikenhead*, (1767), cited by Chambre J. in *Rogers v. Clifton*, 3 B. & P. 587 (1803), p. 594, with which compare *Pattison v. Jones*, post, the existence of any distinction between information volunteered and furnished upon inquiry, is first suggested by Park, J. in his charge to the jury in *Cockayne v. Hodgkinson*, 5 C. & P. 543 (1833), and stated by Denman C. J. and Abinger C. B. charging juries in *Storey v. Challands*, 8 C. & P. 234 (1838), and *King v. Watts*, 8 C. & P. 614 (1838).

duty," and see whether it has ever been held to authorize the publication of defamatory matter under circumstances similar to those which exist in the present case. With regard to the characters of servants and agents, it is so manifestly for the advantage of society that those who are about to employ them should be enabled to learn what their previous conduct has been, that it may be well deemed the moral duty of former employers to answer inquiries to the best of their belief. But, according to the opinion of the same learned judge, intimated in *Pattison v. Jones*, it is necessary that inquiry should be made, in order to render lawful the communication of defamatory matter, although he was also of opinion that such inquiry may be invited by the former master. And in *Rogers v. Clifton*, Chambre, J., quoted a similar opinion of Lord Mansfield's, expressed in *Lowry v. Aikenhead*, Mich. 8 G. 3, 3 B. & P. 594.

Two cases—*Herver v. Dowson*, Bull. N. P. 8, and *Cleaver v. Sarraude*, reported in *McDougall v. Claridge*, 1 Campb. 268—were quoted as authorities for giving a more extended meaning to the term "moral duty," and making it include all cases where one man had information, which, if true, it would be important for another to know. But the notes of those cases are very short: in the former the precise circumstances under which the statement was made—see *King v. Watts*, 8 C. & P. 614, that such a statement made *without inquiry* is not lawful—and in the latter, the position of the defendant with reference to the Bishop of Durham, to whom it was made, are left unexplained. I cannot, therefore, consider them as satisfactory authorities for the position to establish which they were quoted: and, in the absence of any clear and precise authority in favour of it, I cannot persuade myself that it is correct, as, if established at all, it must be at the expense of another moral duty, viz., not to publish defamatory matter unless you *know* it to be true.

For these reasons, I am of opinion, that the rule for a new trial should be made absolute.

ERLE, J. In the present case, the defendant, having reason to believe that he was in possession of information important to the ship-owner, in respect of his captain, gave it for the purpose of preventing a considerable damage to his property from misconduct; and, on this ground, appears to me to be justified.

The defendant also had reason to believe, that, by giving this information, he should save the lives of the crew; and on this ground also, he appears to me to be justified in giving it, either to the crew, or to the ship-owner on their behalf, supposing always that the jury found that he acted with good faith.

Some objection was made to the mode of communication. But it appears to me to have been as cautious as could be required under the circumstances; and, if the defendant acted incautiously, or went to some degree beyond what may be thought to have been strictly required for his purpose, these were matters for the jury, as evidence of malice.

The evil likely to arise from protecting information *bona fide* given to prevent damage from misconduct, appears to me much less

than that which would result from putting a stop to such information, by rendering the giver of it liable in damages, unless he has legal proof of the truth:⁶ and the circumstance of the information being officious, or without reasonable grounds, or of slight importance, ought to be appreciated by the jury.

It follows, that in my judgment, the rule should be discharged.

The court being thus divided in opinion, the rule for a new trial fell to the ground, and the defendant retained his verdict.⁷

KREBS v. OLIVER.

Supreme Judicial Court of Massachusetts, 1858. 12 Gray, 239.

Action of tort for slander, in falsely and maliciously accusing the plaintiff of the crime of larceny by words in substance as follows: "Dr. Krebs was imprisoned many years in a penitentiary in Germany for larceny."

At the trial before *Thomas, J.*, the defendant testified that he had been on intimate terms with the members of the family to whom the charges against the plaintiff's character had been communicated; that he had always repeated them as reports which he had heard; that he had not been previously acquainted with the plaintiff; that he had no malicious intent in speaking, and that he made the communications in good faith, and in pursuance of what he considered a duty.

The defendant also prayed the court to instruct the jury, "that if the words alleged to have been spoken by the defendant of the plaintiff were confidentially communicated by the defendant to the members of the family of a lady whom the plaintiff was about to marry, with which family the defendant was familiarly acquainted and on terms of friendship, and if the defendant believed them to be true, and they were spoken in good faith and without malice, and in pursuance of what the defendant believed to be his moral duty, it was a privileged communication, and the plaintiff cannot recover." But the court refused to give this instruction; and ruled "that the fact that the plaintiff was about to be married could not justify the defendant in reporting to the members of the lady's family the charges alleged, if false, no inquiry having been made of the defendant or information requested from him; that the defendant

⁶ So *Erle C. J.* says in *Whiteley v. Adams*, 15 C. B. N. S. 392 (1863), p. 418, "It is to the interest of society that correct information should be obtained as to the character of the persons in whom others" (*sic*) "have an interest. If every word which is uttered to the discredit of another is to be made the ground of an action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth."

⁷ In *Bennett v. Deacon*, 2 C. B. 628 (1846), decided by the same judges in the same court three months later, the same division of opinion appearing, a verdict for the plaintiff was allowed to stand, the defendant having, in answer to a friend's statement, that he was going to sell goods to the plaintiff on credit, made imputations upon his solvency.

sustained no relation to the family of the lady which would make the communication privileged in law, and that the defence could not be maintained."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

BIGELOW, J.¹ We cannot doubt that the words alleged in the declaration are actionable. We think it equally clear that the words spoken cannot be regarded as a privileged communication or justified by the occasion on which they were uttered. It does not appear that the defendant in speaking them acted either for the protection of any interest of his own, or in the discharge of any duty, social, moral or legal. The person whom the plaintiff was about to marry was neither dependent on the defendant nor connected with him by the ties of consanguinity or otherwise.² No inquiry was made of him by her or her parents or near relatives concerning the character of the plaintiff.³ He was strictly a volunteer in making the communication. A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words, without knowing or ascertaining their truth, far outweighs any claim of mere friendship. Indeed it would be difficult to conceive of a case in which a party could not shelter himself within the protection of his privilege, if the rule should be established that one having no interest of his own to protect, without inquiry or application by one who might have such interest, could be allowed to utter defamatory words, on the ground that he held the relation of a friend toward the person to whom

¹ A part of the opinion, holding that the trial court did not err in refusing to charge that the words spoken were not actionable *per se*, is omitted.

² In the following cases communications as to the character of a fiancé made to a girl or woman by a member of her family were held privileged, *Bayssot v. Hire*, 49 La. Ann. 904 (1897), statements by a father; *Harriott v. Plimpton*, 166 Mass. 585 (1896), by the father and others at his request; *Adams v. Coleridge*, 1 Times L. R. 84 (1884), by brother to sister; *Todd v. Hawkins*, 8 C. & P. 88 (1837), son in law to mother in law. So a communication by a son giving advice to his mother in regard to her business interests is privileged, *Kimble v. Kimble*, 14 Wash. 369 (1896).

Statements made within the family circle in regard to the fiancé or suitor of a member thereof are held privileged in *McBride v. Ledoux*, 111 La. 398 (1904), statements by a girl's sister in law to her sister in law, the girl's sister. A wide latitude of discussion within the family circumstances of matters of interest to all, because it affects the interest of one of them, is allowed in *Campbell v. Bannister*, 79 Ky. 205 (1880), a man whose house had been burned stated to members of his family his belief that plaintiff had set it on fire, but see *Faris v. Starke*, 9 Dana 128 (Ky. 1839), in which the right to talk with others over matters of interest to oneself is stated so broadly as to include strangers as well as members of one's family.

³ Answers to inquiries by the girl herself, or her father, or other members of her family are privileged, *Buisson v. Huard*, 106 La. 768 (1901); *Harriott v. Plimpton*, 166 Mass. 585 (1896). So in *Atwill v. Mackintosh*, 120 Mass. 177 (1876), the report of one employed by a father to investigate the character of his daughter's suitor was held privileged.

he communicated the slander. We know of no rule which holds such communications to be privileged by the occasion.⁴

The instructions which the defendant requested on this part of the case were therefore properly refused.

Exceptions overruled.

SAMPLES v. CARNAHAN.

Appellate Court of Indiana, 1898. 21 Indiana Appeals, 55.

One McNaught held a note against one Halton, which he sent to the plaintiff for collection. The plaintiff's methods offended Halton, who told the defendant, that if they were continued he would never pay the note. The defendant, who had business relations with McNaught, wrote him a letter advising him to take the note out of the plaintiff's hands and containing the defamatory matter complained of. The defendant's third answer averred in substance that he had honestly and in good faith, with probable cause and interest, written the letter in view of the above facts and the duty he owed to McNaught, as a customer and the interest he had in his business success as such.

ROBINSON, J. It is argued by the appellee's counsel that the third paragraph of answer was good in bar of the action, as representing facts showing that the letter complained of was a privileged communication; but with this view of the pleading we cannot agree. It does not appear that the letter was written in answer to a confidential inquiry, nor does the pleading show that the relationship between appellee and the one to whom the letter was addressed was one which the law deems confidential. It does not appear that they were related, or that they were intimate friends, but simply that they were acquaintances who had had business dealings with each other. See *Krebs v. Oliver*, 78 Mass. 239; *Count Joannes v. Ben-*

⁴ *Accord*: "*Joannes*" v. *Bennett*, 5 Allen 169 (Mass. 1862), defendant, who had been pastor of a church of which the girl and her family had been members and who was still an intimate friend of the family, wrote a letter derogatory to the character of the plaintiff who was a suitor for the girl's hand. Whether the communication would have been privileged had the relation of pastor of the family continued, was left undecided; *Byam v. Collins*, 111 N. Y. 143 (1888), Danforth J. *dissenting*, defendant had been an intimate friend of the woman, though the intimacy had terminated some months before, and four years earlier the woman had requested the defendant to give her any information she might have as to the character of the young men of their common acquaintance; *Contra*; *Adcock v. Marsh*, 30 N. Car. 360 (1848), where, though the defendant had been requested by the girl's deceased mother to give her advice, it was held that "without any request she would have been justified in stating her belief in the bad character of the girl's step-mother as a reason for advising her to leave her father's home."

In *Nix v. Caldwell*, 81 Ky. 293 (1883), the right to volunteer information, is denied where only the recipient has any interest to be protected, is said to be confined "to cases, where the parties by reason of their relation to each other are interested in the subject-matter" of the communication, such as statements by an agent to a principal, or a father to a son.

nett, 87 Mass. 169. The letter does not appear to have been written in answer to any previous inquiry, but to have been voluntarily written. And it has been said that, where the matter is not of great or immediate importance, interference may be considered officious and meddlesome, although, if the party had been applied to, it would clearly have been his duty to give all the information he could; and an answer to a confidential inquiry may be privileged, where the same information, if volunteered, would be actionable. See *Odgers Libel & Slander* (2d ed.), p. 204, *et seq.* We are unable to say that the matter mentioned in the letter was of such importance as to warrant the language used in the letter; nor can we say that the circumstances were such as reasonably imposed on appellee the duty to make such statements as those contained in the letter, although he may have believed he was writing the truth. As has been well said, "Although the defendant may feel sure that if he were in his neighbor's place, he should be most grateful for the information conveyed, still he must recollect that it may eventually turn out that in endeavoring to avert a fancied injury to that neighbor, he has really inflicted an undoubted and undeserved injury on the plaintiff." *Odgers Libel & Slander* (2d ed.), 216, and cases cited. Taking account of the circumstances under which the letter was written, the relation at the time existing between the appellee and the recipient of the letter, the nature of the matter about which the letter was written, and the language used in the letter, we cannot say that the letter was privileged.¹

PATTISON v. JONES.

Court of King's Bench, 1828. 8 Barnewell & Cresswell, 578.

BAYLEY, J. Generally speaking, anything said or written by a master when he gives the character of a servant is a privileged communication. If a servant, therefore, charge a master with publishing a libel, it is competent to the latter, under the general issue, to prove that the alleged libel was written under such circumstances as to make it a privileged communication, and thereby throw on the plaintiff the necessity of shewing that it does not come within that protection which the law gives to a privileged communication. But if the supposed libel be not communicated bona fide, it does not fall within the protection which the law extends to privileged communications. Here the second letter of the defendant was written in answer to one calling upon him to give an account of the plaintiff's conduct, but the defendant wrote his first letter without being called upon so to do. I do not mean to say that in order to make libellous matter written by a master privileged, it is essential that the party

¹ In "*Joannes*" v. *Bennett*, 5 Allen 169 (Mass. 1862), Bigelow C. J. says: "The duty of avoiding the use of defamatory words can not be set aside, except where it is essential for the protection of some substantial private interest, or to the discharge of some other paramount and urgent duty."

who makes the communication should be put into action in consequence of a third party's putting questions to him. I am of opinion he may (when he thinks another is about to take into his service one whom he knows ought not to be taken) set himself in motion, and do some act to induce that other to seek information from and put questions to him. The answers to such questions, given bona fide with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury, whether the defendant has acted bona fide, intending honestly to discharge a duty; or whether he has acted maliciously, intending to do an injury to the servant? In forming their judgment, the jury in this case were bound to take into their consideration the fact of the defendant's having voluntarily put himself into motion, and thereby in effect having, by the first letter, desired Mr. Mornay to put questions to him.

Upon the question, whether a master who has written a libel in giving the character of a servant has acted bona fide or not, it may make a very material difference whether he volunteered to give the character, or had been called upon so to do. At all events, when he volunteers to give the character, stronger evidence will be required that he acted bona fide, than in the case where he has given the character after being required so to do.

Rule refused.

MORSE v. TIMES-REPUBLICAN PRINTING CO.

Supreme Court of Iowa, 1904. 124 Iowa, 707.

WEAVER, J. But it is very manifest that the classification of cases above given in which privilege may be claimed for matter otherwise libelous is not broad enough to include a publication such as we here have to deal with. Some effort is made in argument to bring it within the general scope of the duty which defendant owed to the public. This phase of the doctrine of privilege has been generally invoked in cases where the plaintiff holds or is a candidate for some position of public trust. Such has been the character of the cases in which this court has applied or considered the plea of public duty in defense of a charge of libel. *Mott v. Dawson*, 46 Iowa, 533; *State v. Haskins*, 109 Iowa, 656; *Bays v. Hunt*, 60 Iowa, 251. The utmost extent to which these cases go is that where a person, knowing or honestly believing that a candidate for public office is guilty of conduct affecting his fitness for the position to which he aspires, communicates that knowledge or belief to the electors whose support the candidate seeks, acting in good faith in the discharge of his duty to the public, the communication is privileged—a doctrine the correctness of which we need not now consider. But there is no moral or legal duty resting upon any person to publish to the world defamatory matter affecting the character or reputa-

tion of one whose only relation to the public is that of a private citizen in the pursuit of a lawful private business; and if one assumes the responsibility of proclaiming such matter from the house-tops, or through the public print, the law affords him no defense except upon proof of the truth of the publication. An insurance agent as such is not a public officer, nor is his character a matter of general public interest, except as the public has an indirect interest in the private character and conduct of every member of society, but this interest is not sufficient to invoke the privilege of which we are speaking. To hold otherwise would be to destroy at one sweep the effectiveness of all law against slander and libel. Even the right to plead the truth of a libel is restricted by the constitutional provision herein cited to publications made "with good motives, and for justifiable ends." If we understand the force of the answer sought to be interposed to the plaintiff's action, it is that defendant, being the publisher of a newspaper, is in duty bound to publish the news of the day for the benefit of its readers, and if, after due investigation, and in the exercise of reasonable care, and without actual malice, it publishes defamatory matter concerning a citizen, the person so injured is without remedy, such publication being privileged. This proposition is without support in principle or precedent. The publisher has no right to publish in his paper matters or statements which he or any other citizen would not be justified in circulating by letter or by posting upon the blank walls of the city. Our Constitution guarantees to every person liberty "to speak, write, and publish his sentiments on all subjects," but holds him "responsible for the abuse of that right." Constitution of Iowa, Article 1, Section 7. "Liberty of the press" has never been held to mean "that the publisher of a newspaper shall be any less responsible than another person would be for publishing otherwise the same libelous matter." The contrary rule has been affirmed by the courts of this country and England with great uniformity. *Jones v. Townsend*, 21 Fla. 431; *Sheckell v. Jackson*, 10 Cush. 25; *Aldrich v. P. P. Co.*, 9 Minn. 138; *Root v. King*, 7 Cow. 628; *Tillson v. Robbins*, 68 Maine 295; *Smart v. Blanchard*, 42 N. H. 137; *Foster v. Scripps*, 39 Mich. 376; *Barr v. Moore*, 87 Pa. 385; *Evis-ton v. Cramer*, 47 Wis. 659; *Edwards v. San J. Pr. Soc.*, 99 Cal. 431; *McAllister v. F. Press*, 76 Mich. 338; *Upton v. Hume*, 24 Ore. 420; *Smith v. Tribune*, 4 Biss. 477; *Davis v. Sladen*, 17 Ore. 259; *Barnes v. Campbell*, 59 N. H. 128; *Davis v. Duncan*, 7 El. & Bl. 231; *Mallory v. P. P. Co.*, 34 Minn. 521; *Delaware, etc., Ins. Co. v. Crosdale*, 6 Houst. 181; *Palmer v. Concord*, 48 N. H. 216. See also, exhaustive note by Mr. Freeman, 15 Am. St. Rep. 343. The tendency of all the authorities is indicated in the following excerpts from some of the cases above cited: "The publisher of a newspaper possesses no immunity from liability on account of a libellous publication, not belonging to any other citizen." Bean, J., in *Upton v. Hume*. "The press does not possess any immunities not shared by every individual," Flandreau, J., in *Aldrich v. P. P. Co.* "The liberty of the press is not more under the protection of the Constitu-

tion than the liberty of speech, and the publisher of a newspaper can only defend an action for libel, or mitigate the damages to be recovered therefore, upon precisely the same grounds as any other individual could defend an action for slander in uttering the same words on the street." De Haven, J., in *Edwards v. San J. Pr. Soc.* Further citation of authorities is unnecessary. None have been called to our attention holding to the doctrine contended for in support of the ruling appealed from.¹

(d) Communications made to aid the administration of justice.

FOWLER v. HOMER.

Court of King's Bench, at Nisi Prius, 1812. 3 Campbell, 294.

This was an action for defamation. Plea, the general issue.

The defendant is a haberdasher. On a Saturday evening, while he was absent, Mrs. Fowler came into his shop, and bought some goods. Soon after she was gone, his shopman missed a roll of riband, and mistakenly supposed that she had stolen it, but did not then pursue her. On the following Monday, as she was again passing the shop, the shopman pointed her out to the defendant as the person who had stolen the riband. The defendant brought her into the shop, and accused her of the robbery, which she positively denied. He then carried her into an adjoining room, and sent for her father, to whom he repeated the accusation. After a good deal of altercation, she was allowed to go home, and there the matter rested.

LORD ELLENBOROUGH. I am clearly of opinion that this action cannot be maintained. There appears to be no malice on the part of the defendant. I suppose this lady to be completely innocent of the offence laid to her charge; but she has not been wantonly or maliciously calumniated. When a servant represents to a master that his goods have been stolen by a particular individual, it is justifiable for the master, with a view to enquiry, to tax that individual with the theft; and, although the suspicion turns out to be erroneous, the law gives no redress to the party accused. The accusation, though unfounded, was not malicious. No doubt it may prove very detrimental to the object of it; but this is one of many instances where, there being a loss without an injury, the sufferer must consider himself not wronged, but unfortunate. If the defendant had continued to propagate the story to strangers, that would have furnished evidence of malice; but if he could not lawfully charge the person suspected on reasonable grounds, though innocently, of having committed the theft, it would be quite impossible for a man who

¹ Accord: *Anderson v. Fairfax*, 4 N. S. W. R. L. 183 (1883); *Atlanta News Pub. Co. v. Medlock*, 123 Ga. 714 (1905); *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238 (1891).

is robbed to enquire with any safety after the stolen goods. From sitting in another place, I know that the shopkeepers of this town are subject to the most enormous pillage; and they must have an opportunity of protecting their property,¹ and bringing offenders to justice.²

This exposition of the law was acquiesced in by the plaintiff's counsel; but an instance was pointed out in which the defendant had rather transgressed the line of investigation above laid down, whereupon the parties agreed to withdraw a juror.³

¹ See *Brow v. Hathaway*, ante, and cases cited in note thereto.

² See Coltman, J. in *Padmore v. Lawrence*, 11 A. & E. 380 (1840); "For the sake of public justice charges and communications, which would otherwise be slanderous, are protected if *bona fide* made in the prosecution of an inquiry into a suspected crime"—quoted by Morton J. in *Eames v. Whittaker*, 123 Mass. 342 (1877), p. 344, with the addition of the following: "and for the purpose of detecting and bringing to punishment the criminal"; and see Lacey, J. in *Christman v. Christman*, 36 Ill. App. 567 (1889), p. 575; and Adam, J. in *Lightbody v. Gordon*, 9 Sc. Sess. Cases, 4th Ser. 934 (1882), p. 942, "People would be prevented from doing their duty if a man who honestly believed that he could give information to the police felt he could do so only with the threat of an action of damages hanging over his head."

³ Accord: *Padmore v. Lawrence*, 11 A. & E. 380 (1840); *Collins v. Cooper*, 19 Times L. R. 118 (1902); *Dale v. Harris*, 109 Mass. 193 (1872); *Christman v. Christman*, 36 Ill. App. 567 (1889); and *Chapman v. Battle*, 124 Ga. 574 (1905); and see *Brow v. Hathaway*, ante; statements made by the person against whom the wrong was committed to the suspected person in the presence of third persons; *Billings v. Fairbanks*, 136 Mass. 177 (1883), to a friend of the latter sent by him to inquire the grounds on which he had been accused, *Eames v. Whittaker*, 123 Mass. 342 (1877), to a friend in informing him of the crime and in answer to the latter's inquiries as to whether he suspected any one; *Grimes v. Coyle*, 6 B. Monr. 301 (Ky. 1845), similar facts; *Johnson v. Evans*, 3 Esp. 32 (1799), *Dale v. Harris*, *Eames v. Whittaker*, 123 Mass. 342 (1877); *Christman v. Christman*, 36 Ill. App. 567 (1889), to a constable in procuring the plaintiff's arrest or in an effort to aid the investigation or to recover the property stolen, *Shinglemeyer v. Wright*, 124 Mich. 230 (1900); *Klinck v. Colby*, 46 N. Y. 427 (1871), statements in an agreement, made by persons who believed themselves to have been swindled, to share the expenses of prosecution, and see *Jones v. Thomas*, 34 W. R. 104 (1885), where the defendant had an interest in the statement, as it was contained in a paper providing for restitution of money, stolen from his master largely owing to his own incapacity, *Lightbody v. Gordon*, 9 Sc. Sess. Cases, 4th Ser. 934 (1882), statements by third persons having peculiar knowledge of the crime to police officers or in the course of inquiry of others likely to have valuable information. In *Miller v. Nuckolls*, 77 Ark. 64 (1905), statements of the defendant's suspicions of the plaintiff made to the police for the purpose of the investigation of the supposed crime and bringing the offender to justice were held privileged. In *Faris v. Starke*, 9 Dana 128 (Ky. 1839), a member of the community in which the crime was committed was held privileged to express to his brother his belief in the plaintiff's guilt; and in *Harper v. Harper*, 10 Bush. 447 (Ky. 1874), similar expressions made to persons not members of his family while the community was endeavoring to discover the criminal, were held privileged; but see *Harrison v. Fraser*, 29 W. R. 652 (1881), where statements made by a draper in the course of questions put to his own assistant and the assistant of the plaintiff, a neighboring draper, whom he suspected stealing from him, were held by Lindley, J. not to be privileged. In *Hancock v. Blackwell*, 139 Mo. 440 (1897), and *Bigner v. Hodges*, 82 Miss. 215 (1903), statements of belief in the plaintiff's guilt made to

SECTION 3.

The Right to Publish Reports of Legislative, Judicial and Public Proceedings.

WASON v. WALTER.

Court of Queen's Bench, 1868. Law Reports 1868-69, 4 Q. B., 73.

COCKBURN, C. J. This case was argued a few days since before my Brothers Lush, Hannen and Hayes, and myself, and we took time, not to consider what our judgment should be, for as to that our minds were made up at the close of the argument, but because, owing to the importance and novelty of the point involved, we thought it desirable that our judgment should be reduced to writing before it was delivered.

The main question for our decision is, whether a faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not.

Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in parliament debates have been reported in the public journals, this is the first instance in which an action of libel founded on a report of a parliamentary debate has come before a court of law. There is, therefore, a total absence of direct authority to guide us. There are, indeed, dicta of learned judges having reference to the point in question, but they are conflicting and inconclusive, and, having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extrajudicial.¹

the officer to whom the crime had been reported, by one having no interest to protect and no personal knowledge of the fact, was held not privileged, and statements to a police officer charging the plaintiff with being a whore, made without intent to prevent or punish her offense, were held not privileged in *Stewart v. Major*, 17 Wash. 238 (1897). Statements by a police officer while investigating a crime are privileged, *Morton v. Knipe*, 112 N. Y. S. 451 (1908), as are those made in answer to inquiries by one interested in discovering the wrongdoer or recovering property stolen, *Kine v. Sewell*, 3 M. & W. 297 (1838), "is," said Parke, B., "a man's mouth to be closed, when he is asked, did he see another person steal the inquirer's property?"—accord, *Grimes v. Coyle*, 6 B. Monr. 301 (Ky. 1845).

¹ The proceedings of a parliamentary committee may be reported, *Kane v. Mulvany*, Ir. R. 2 C. L. 402 (1868). A city council is held in *Buckstaff v. Hicks*, 94 Wis. 34 (1896), not to be a legislative body whose proceedings can be voluntarily reported as news; see 51 and 52 Vict., c. 64, §§ 3 and 4 (1888), conferring "qualified privilege" on fair and accurate reports of judicial proceedings, and of vestries, town councils and a number of other specified bodies, and Wisconsin Statute of 1898, § 4256 a. In *Trebby v. Transcript Publishing Co.*, 74 Minn. 84 (1898), it was held that no privilege attached to a report of a resolution, which had no operative force, being a resolution condemning the plaintiff as a traducer of the city of St. Paul; but compare *How-*

Several cases were cited in the course of the argument before us, but they turned for the most part on the question of parliamentary privilege, and therefore appear to us very wide of the present question. The case of *Rex v. Wright*, 8 T. R. 293, approaches nearest to the one before us. In that case a committee of the House of Commons having made a report imputing to Horne Tooke seditious and revolutionary designs after his acquittal on a trial for high treason, and the House having ordered the report to be printed for the use of its members, the defendant, a bookseller and publisher, printed and published copies of the report. On an application for a criminal information the Court refused the rule, apparently on the ground that the report of a committee of the House of Commons, approved of by the House, being part of the proceedings of parliament, could not possibly be libellous. Lord Kenyon, C. J., says, "This report was first made by a committee of the House of Commons, then approved by the House at large, and then communicated to the other House, and it is now subjudice; and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceeding of either of the houses of parliament is a libel; and yet that is to be taken as the foundation of this application." Lord Kenyon and his colleagues appear to have thought that a paper, though containing matter reflecting on the character of an individual, if it formed part of the proceedings of the House of Commons, would be so divested of all libellous character as that a party publishing it, even without the House, would not be responsible at law for the defamatory matter it contained. If this doctrine could be upheld, it would have a manifest bearing on the present question, for as no speech made by a member of either house, however strongly it may assail the conduct or character of others, can be held to be libellous, it would follow, such a speech being a parliamentary proceeding, that the publication of it would not be actionable. But this is directly contrary to the decision in *Rex v. Lord Abingdon*, 1 Esp. 226, and *Rex v. Creevey*, 1 M. & S. 273, in which the publication of speeches made in parliament reflecting on the character of individuals was held to be actionable. And it must be admitted that the authority of the case of *Rex v. Wright*, 8 T. R. 293, is much shaken, not only by the decision in *Rex v. Creevey*, but also by the observations made by Lord Ellenborough in his judgment in the latter case.

Decided cases thus leaving us without authority on which to proceed in the present instance, we must have recourse to principle in order to arrive at a solution of the question before us, and fortunately we have not far to seek before we find principles in our opinion applicable to the case, and which will afford a safe and sure foundation for our judgment. It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible.

land v. Town of Maynard, 159 Mass. 434 (1893), publication by a town of a report of an investigating committee appointed by it.

The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel, malice is said to be the gist of an action for defamation. And though it is true by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual malice, is meant, while by legal malice, as explained by Bayley, J., in *Bromage v. Prosser*, 4 B. & C. 255 (E. C. L. R. Vol. 10), is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise.

It is thus that in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged.

The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in parliament from that of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J., in *Rex v. Wright*, 8 T. R. 298, namely, that "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings." In *Davison v. Duncan*, 7 E. & B. 231 (E. C. L. R. vol. 90), 26 L. J. Q. B. 106, Lord Campbell says, "A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the inconvenience of publicity." And Wightman, J., says:—"The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which

counterbalances the injury to individuals, though that at times may be great."

Both the principles, on which the exemption from legal consequences is thus extended to the publication of the proceedings of courts of justice, appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned. There is also in the one case as in the other a preponderance of general good over partial and occasional evil. We entirely concur with Lawrence, J., in *Rex v. Wright*, 8 T. R. 298, that the same reasons which apply also to proceedings in parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed,—where would be our attachment to the constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings of parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing parliamentary reports would be placed, if this distinction were to be enforced and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the state,—no subject of parliamentary discussion which more requires to be made known than an inquiry relating to it. Of this no better illustration could possibly be given than is afforded by the case before us. A distinguished counsel, whose qualification for the judicial bench had been abundantly tested by a long career of forensic eminence, is promoted to a high judicial office, and the profession and the public are satisfied that in a most important post the serv-

ices of a most competent and valuable public servant have been secured. An individual comes forward and calls upon the House of Lords to take measures for removing the judge, in all other respects so well qualified for his office, by reason that on an important occasion he had exhibited so total a disregard of truth as to render him unfit to fill an office for which a sense of the solemn obligations of truth and honor is an essential qualification. Can it be said that such a subject is not one in which the public has a deep interest, and as to which it ought not to be informed of what passes in debate? Lastly, what greater anomaly or more flagrant injustice could present itself than that, while from a sense of the importance of giving publicity to their proceedings, the houses of parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them, while every member of the educated portion of the community from the highest to the lowest looks with eager interest to the debates of either house, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that a party publishing a parliamentary debate is to be held liable to legal proceedings because the conduct of a particular individual may happen to be called in question?

It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other; a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of *Rex v. Lord Abingdon*, 1 Esp. 226, and *Rex v. Creevey*, 1 M. & S. 273. At the same time it may be as well to observe that we are disposed to agree with what was said in *Davison v. Duncan*, 7 E. & B. 233 (E. C. L. R. vol. 90), 26 L. J. Q. B. 107, as to such a speech being privileged if bona fide published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in parliament.

It only remains to advert to an argument urged against the legality of the publication of parliamentary proceedings, namely, that such publication is illegal as being in contravention of the standing orders of both houses of parliament. The fact, no doubt, is, that each house of parliament does, by its standing orders, prohibit the publication of its debates. But, practically, each house not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in *Hansard* or the public journals, and in every debate reports of former speeches contained therein are constantly referred to. Collectively, as well as individually, the members of both houses would

deplore as a national misfortune the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of parliamentary proceedings is prohibited by parliament. The standing orders which prohibit it are obviously maintained only to give to each house the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings. Practically, such publication is sanctioned by parliament; it is essential to the working of our parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. Should either house of parliament ever be so ill-advised as to prevent its proceedings from being known to the country—which certainly never will be the case—any publication of its debates made in contravention of its orders would be a matter between the house and the publisher. For the present purpose, we must treat such publication as in every respect lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected.

KIMBALL v. POST PUBLISHING CO.

Supreme Judicial Court of Massachusetts, 1908. 199 Mass. Rep. 248.

HAMMOND, J. The articles of which the plaintiffs complain contained reports of certain proceedings in court and also of a meeting of stockholders of a corporation called the Burrows Lighting and Heating Company.

The articles in question contained among others the following statements: "At the office of C. Henry Kimball, 97 Haverhill Street, officers, stockholders and lawyers interested in the Burrows Lighting and Heating Company met this morning. The affairs of the Burrows Lighting and Heating Company have been before the public for a considerable time, are apparently in a badly tangled condition. An order of notice was recently issued by the Superior Court against C. Henry Kimball, William Galletly and the Burrows Lighting and Heating Company, ordering them to appear in court on Thursday of this week to show cause why they should be restrained from holding any meeting. The charges were that the holders of a majority of the capital stock of the company had fraudulently secured control over 416,000 shares of stock."

By an inspection of the bill in equity and of the order of the court it appears that the statement in the articles was a fair report of the court proceedings. And we are further of opinion that the ruling that the evidence did not warrant a finding of malice, was correct. So far, therefore, as the plaintiff attempted to hold the

defendants as to so much of the articles as related to the proceedings in court they failed to make out a case.

But there was something more in the articles than the report of the proceedings in court. There was a report of the meeting of the stockholders of a private corporation; and unless this part of the report is also privileged the defense, so far as resting upon that ground, must fail. It is argued by the defendants that "the public is interested and concerned in a meeting of stockholders of a corporation such as is described in the" articles in question, and that reports of such meetings are privileged if fair and made without malice. But the difficulty with this argument is that unless modified by statutory provision the law in England and in this Commonwealth always has been otherwise. It is to be noted that we are not dealing with what is said at the meeting nor with the person who said it. No doubt a stockholder at such a meeting, speaking to stockholders, may with impunity say things derogatory to an officer or the manager of the company provided that what he says be pertinent to the matter in hand and he speaks in good faith and without malice. His justification rests upon the fact that he is speaking to the stockholders upon a subject in which he and they have an interest.

On the contrary we are dealing with a report in a nature of the repetition of the defamatory remarks, which report is made by a stranger, having no interest in the question, to other strangers, called the public, equally without interest. It is manifest that the grounds for the privilege under which the original speaker, the stockholder, is protected cannot serve the publisher of the report. *Davison v. Duncan*, 7 El. & Bl. 229. *De Crespigny v. Wellesley*, 5 Bing. 392. The privilege of the publisher, if any he has, must rest upon other grounds.

It is stated by some authorities that by the common law of England reports of judicial and parliamentary proceedings alone were privileged. While it is said by Shaw, C. J., in *Barrows v. Bell*, 7 Gray, 301, that this statement, unqualified, is too broad, still subsequent decisions seem to show clearly that in England the principle of privilege is confined to reports of judicial or quasi judicial bodies. No privilege was attached to the report of other public unofficial meetings. Hence, if in such a case a report containing any defamatory statement of fact was printed in a newspaper the proprietor's only defense was that the statement was true. *Purcell v. Sowler*, 1 C. P. D. 781; 2 C. P. D. 215. See also Odgers, *Libel & Slander*, (4th ed.) Appendix B, and the authorities therein cited. Since the question in this last case the law has been somewhat modified so far as respects official and other public meetings. But these statutes have been somewhat strictly construed, and even now a fair report is not always safe. *Ponsford v. Financial Times*, 16 T. L. R. 248.

The subject was quite freely discussed by Shaw, C. J., in *Barrows v. Bell*, *ubi supra*, and the following language was used (p. 313): "Whatever may be the rule as adopted and practised on in England, we think that a somewhat larger liberty may be claimed in

this country and in this Commonwealth, both for the proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people. So many municipal, parochial and other public corporations, and so many large voluntary associations formed for almost every lawful purpose of benevolence, business or interest, are constantly holding meetings, in their nature public, and so usual is it that their proceedings are published for general use and information, that the law, to adapt itself to this necessary condition of society, must of necessity admit of these public proceedings, and a just and proper publication of them, as far as it can be done consistently with private rights. This view of the law of libel in Massachusetts is recognized, and to some extent sanctioned, by the case of *Commonwealth v. Clap*, 4 Mass. 163, and many other cases." And it was held that the publication by a member of the Massachusetts Medical Society of a true account of the proceedings of that society in the expulsion of another member for a cause within its jurisdiction, and of the result of certain suits subsequently brought by him against the society and its members on account of such expulsion, is privileged.

The above language of the court, however liberal its construction, is not to be understood as applying to strictly private meetings. It applies at the most only to meetings public in their nature, or where the proceedings concern the public. In that case it was said that the charter of the Massachusetts Medical Society "invested the society, their members and licentiates, with large powers and privileges, in regulating the important public interest of the practice of medicine and surgery, enabled them to prescribe a course of studies, to examine candidates in regard to their qualifications for practice, and give letters testimonial to those who might be found duly qualified." It was also stated that it appeared by the acts incorporating this society that it was regarded by the Legislature "as a public institution, by the action of which the public would be deeply affected in one of its important public interests, the health of the people." It was further said that the proceedings of which the report was made "might be rightly characterized, as in the case of *Farnsworth v. Storrs*, (5 Cush. 412) as *quasi* judicial." And it was upon the latter ground that the communication was adjudged to be privileged.¹

The case before us is entirely different. The meeting was simply that of a private corporation invested with no privileges and owing no special duties to the public. It was an ordinary business

¹ *Accord: Allbutt v. General Medical Education Society*, L. R. 23 Q. B. D. 400 (1889), in both cases duties and powers whose performance and exercise were essential to the protection of the public as well as the profession, had been entrusted to the association involving the exercise of a quasi judicial function. A fair report in a public newspaper of a trial by an ecclesiastical tribunal is, in *Lothrop v. Adams*, 133 Mass. 471 (1882), *semble*, said to be privileged, though no such duties or powers had been entrusted to it, and in *Rabb v. Trevelyan*, 122 La. 174 (1908), a similar report of an ex parte trial of a bookmaker, by a racing association of which he was a member and which resulted in his being ruled off all race tracks under its control, was held privileged.

meeting. Whether any member was in fraudulent possession of stock, or had mismanaged the affairs of the corporation, or whether the plaintiffs were unfit to continue as officers, or the corporation had been made bankrupt, were matters with which the public were in no way concerned. The meeting was for the stockholders alone. Only they or their duly constituted agents were entitled to be present. The meeting was neither public nor for a public purpose. As well might it be said that a private conference between the members of a partnership on partnership matters was a public meeting. For the purposes of the meeting it might have been necessary for charges to be made by one stockholder against another stockholder or an officer, and that the charges should be discussed and their truth or falsity determined; and so far the actors were well within the privilege. They had a duty to perform in a matter in which all were interested. But for obvious reasons hereinbefore stated the mantle of protection cannot cover him who, having no interest, repeats the defamatory words to others also without interest. And in this matter the conductor of a newspaper stands no better than any other person. As was said in *Sheckel v. Jackson*, 10 Cush. 25, 26, 27, in a reply to a contention that conductors of the public press are entitled peculiar indulgence and have especial rights and privileges, "the law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more." These words, although spoken more than half a century ago, state the law as it exists to-day, except so far as it has been modified by statute, and there has been no statute material to the question before us. The result is that the articles were not privileged so far as they reported the proceedings of the corporation.

It is argued by the defendants that inasmuch as the charge in the bill in equity was the same as that made at the meeting, namely, that the majority of the stock was in the fraudulent possession of the plaintiffs, it will be impossible for the plaintiffs to contend that any alleged damage was suffered from the one rather than the other, and therefore if one report is privileged the action cannot be maintained. This is untenable. Even if the charge in substance is the same, it is evident that a charge made in a bill in equity filed in court may not be regarded as so serious a matter as a charge made by one's business associates in a business meeting. The difficulty of separating the damages gives no immunity to the defendants.

Exceptions sustained.

METCALF v. TIMES PUBLISHING CO.

Appellate Division of the Supreme Court of Rhode Island, 1898. 20 R. I. 674.

Trespass on the case for libel. Heard on demurrer to defendant's special plea in justification.

STINESS, J. The plaintiff sues to recover damages for a libel

alleged to have been printed in "The Evening Times," a newspaper in Pawtucket, published by the defendants. The declaration sets out that upon the filing of a bill in equity by Annie Campbell against the plaintiff and other associates in business, charging them with having conspired to defraud her deceased husband, Duncan H. Campbell, of certain letters patent of this and foreign countries, and, upon the order by a justice for citation an *ex parte* preliminary injunction, until hearing, the defendants published the charges of fraud, to the damage of the plaintiff.

The defendants plead specially that the said Evening Times was a public newspaper; that they published said matters because they believed them to contain information which it was important for the public to know; that said matters were a part of the public records of this court, upon which there had been judicial action, which, denying all malicious intent, it was lawful for them to do.

The plaintiff demurs to the plea.

The question of privileged communications is one that has been much considered, and certain lines may now be said to be well established.

In *The King v. Wright*, 8 D. & E. 293, in 1799, which was an application for a criminal information for libel growing out of the *Horne Tooke* case, it was held that a report of the House of Commons could be published, even though it reflected on the character of an individual.

Hoare v. Silverlock, 9 C. B. 20, was to the effect that a full and impartial report of a trial in a court of justice could be published.¹ Some stress was laid upon the distinction between a full trial and an *ex parte* proceeding, which, however, was not necessary to the decision of this case.

Davison v. Duncan, 7 E. & B. 229, held that a fair report of defamatory matter uttered in a public meeting was not privileged.

McGregor v. Thwaites, 3 B. & C. 24 (10 E. C. L. 6), 1824, held that proceedings before a magistrate, not judicial but advisory, were not privileged, and *Duncan v. Thwaites*, 3 B. & C. 556 (10 E. C. L. 179), extended the rule to proceedings which took place in the course of preliminary inquiry before a magistrate.

Lewis v. Levy, E. B. & E. 535, questioned the decision in *Dun-*

¹ Accord: *McClure v. Review Publishing Co.*, 38 Wash. 160 (1905); *American Publishing Co. v. Gamble*, 115 Tenn. 663 (1905), unless the publication is prohibited by the court or the subject-matter is unfit for publication, *American Publishing Co. v. Gamble*, *semble*; see *Rex v. Clement*, 4 B. & Ald. 218 (1821); *Rex v. Mary Carlile*, 3 B. & Ald. 167 (1819), and *Steele v. Branman*, L. R. 7 C. P. 261 (1872).

See as to the right to report the proceedings of a body appointed by congress, a state legislature, or a municipal legislative body, to investigate matters of public interest, *Terry v. Fellows*, 21 La. Ann. 375 (1869); *Meteye v. Times-Democrat*, 47 La. Ann. 824 (1895); and see *Belo & Co. v. Wren*, 63 Tex. 686 (1884).

The privilege is not peculiar to newspapers, any one may fairly report in writing or print, or repeat verbally, any judicial proceedings, *Butt, L. J.*, in *Milissich v. Lloyds*, 46 L. J. C. P. 404 (1877), p. 407; *Salmon v. Isaac*, 20 L. T. 885 (1869).

can v. Thwaites, and although the case was understood to hold that the privilege of a fair report extended to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge, terminating in the discharge of the prisoner, yet the court did not expressly decide that question.

Reg. v. Gray, 10 Cox Crim. Cas. 184, carried the rule to this extent, but the court was not unanimous in the decision.

In *Usil v. Hales*, 47 L. J. (1878) 323, Lord Coleridge, C. J., fully adopted the apparent rule of *Lewis v. Levy*, and Lopes, J., concurring, said: "There are authorities which, until they are carefully examined, would seem to support the contention that an *ex parte* proceeding in courts is not privileged. So far as I can ascertain, these are cases where the proceeding was preliminary, and where there was no final determination at the time of the alleged libelous report." In *Wason v. Walter*, L. R. 4 Q. B. 73, the dictum of Cockburn, C. J., goes further, that fair reports of all *ex parte* proceedings are privileged.

Ryalls v. Leader, L. R. 1 Exch. 296, held that the examination of a debtor in custody, before a registrar in bankruptcy, was a proceeding before a public court, and hence privileged.

In *Kimber v. The Press Association*, 1 Q. B. Div. (1893) 65, the court went to the full length of holding that the publication of a fair report of proceedings held in open court, though preliminary and *ex parte*, is privileged. This case is quite remarkable from several facts. It was an application to magistrates, specially called together by the clerk, for a summons to one charged with perjury, and no evidence was given under oath. The application was granted, and one of the principal questions argued was whether it was an open court. It was also held that the matter was one for final determination, because if it was refused it would be final, and if it was granted there would be a further inquiry and the matter might go on to trial.

Following the outline of leading decisions, in which there has been a gradual progress, the law of England seems now to be that a full and fair report of proceedings in an open court, upon a matter standing for final decision, even though the inquiry may be preliminary and *ex parte*, is privileged. See opinion of Kay, L. J., in *Kimber v. Press Association*.

In this country the law has been declared in very much the same way. In *Cincinnati Gazette v. Timberlake*, 10 Ohio St. 548, 1860, it was held that privilege does not extend to the publication of preliminary proceedings merely, which are of a purely *ex parte* character. The opinion, however, follows the earlier English cases.

Barber v. St. Louis Dispatch, 3 Mo. App. 377, laid down this rule: "Where a court or public magistrate is sitting publicly, a fair account of the whole proceedings, uncolored by defamatory comment or insinuation, is a privileged communication, whether the proceedings are on a trial or on a preliminary and *ex parte* hearing. But the very terms of the rule imply that there must be a hearing of some kind. In order that the *ex parte* nature of the proceeding may not

destroy the privilege—to prevent such a result—there must be at least so much of a public investigation as is implied in a submission to the judicial mind, with a view to judicial action.” In this case a petition for divorce had been filed, but it had not been presented to a court at any sitting, with a view to judicial action.

In *Park v. Detroit Free Press*, 72 Mich. 560, it was held that the publication of the pleadings or other contents of the files in a private suit before hearing, or action in open court, is not privileged.²

McBee v. Fulton, 47 Md. 403, held that an examination before a magistrate, whether the accused permits them to be *ex parte* or whether he makes defence, is privileged, upon the ground that it is a proceeding before a public court of justice.

In New York, a statute of 1854, limiting actions for the publication of a fair and true report of judicial proceedings to cases of malice, was held to be declaratory of the common law, in *Ackerman v. Jones*, 37 N. Y. Super. 42, and that under the statute an *ex parte* affidavit presented to a police magistrate to obtain a search warrant was privileged.

Cowley v. Pulsifer, 137 Mass. 392, contains a full review of this subject by Mr. Justice Holmes. It was an action for libel in publishing a petition for the removal of an attorney from the bar, which had not been presented to the court. The question, therefore, was quite different from the one before us, but the court assumes the rule, admitted by the plaintiff in that case, that the privilege attaches to fair reports of judicial proceedings, even if preliminary and *ex parte*.

The rule, as thus stated, seems now to be settled as the law, both in England and this country, and it makes a clear line of distinction between publications which are lawful and those which are not.

It gives no license to publish libelous matter simply because it is found in the files of a court. As a publisher of news and items of public importance the press should have the freest scope; but as a scandal-monger it should be held to the most rigid limitation. If a

² Accord: *Byers v. Meridian Printing Co.*, 84 Ohio St. 408 (1911), and cases cited therein, and in the note thereto in 38 L. R. A. (N. S.) 913; and *Nixon v. Dispatch Printing Co.*, 101 Minn. 309 (1907), 12 L. R. A. (N. S.) 188 with note, compare *Thompson v. Powning*, 15 Nev. 195 (1880).

An accurate transcript of court records relating to any judicial proceedings is privileged, *Andrews v. Nott Bower*, L. R. 1895, 1 Q. B. 888, p. 896; *Fleming v. Newton*, 1 H. L. C. 363 (1848), even though the record is itself inaccurate, *McCabe v. Joynt*, 1901, 2 Ir. R. 115, though a belated transcript of a record of judicial action since reversed, or the publication of a judgment as existing which has been satisfied, is not privileged, *McNally v. Oldham*, 16 Ir. C. L. R. 298 (1863); *Williams v. Smith*, L. R. 22 Q. B. D. 134 (1888). But one reporting such records does so at his peril and the transcript is not privileged if inaccurate, *Stubbs v. Russell*, L. R. A. 913 A. C. 38; *Ingram v. Reed*, 5 Pa. S. C. 550 (1897). As to the right to publish transcripts from other records by statute open to the public, compare *Reiss v. Perry*, 11 Times L. R. 373 (1895), 64 L. J. Q. B. 566, with *Connors v. Publishing Co.*, 183 Mass. 474 (1903).

man has not the right to go around to tell of charges made by one against another, much less should a newspaper have the right to spread it broadcast and in enduring form. It is necessary to the ends of justice that a party should be allowed to make his charges against another, for adjudication, even though they may be of a libelous character, and as such they are privileged, the injured party having a remedy for malicious prosecution when they are made maliciously or without probable cause. But the right of a party to make charges gives no right to others to spread them. When the charges come up for adjudication, however, although their publication may be as harmful and distressing to the person accused as if they had been published before their consideration by a court, a different rule applies. Individual feelings are no longer considered, for the reason, as stated by Judge Holmes: "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."

Accepting and applying the rule, as we understand it to be, two questions arise: First, does the plea set forth a proceeding before a court, and, second, does it aver to be a full and fair report.

As to the first question, it sets out an application in chambers, upon a motion for an *ex parte* injunction before and until a hearing. Ordinarily the only consideration which is, or can be, given to it is whether the bill states an exigency upon its face sufficient to warrant an order to hold property *in statu quo*, until a hearing can be had. This is, indeed, a judicial matter, but of the most insignificant sort and very near to the border line. It is a matter submitted to a judge, and he acts upon it. It is within the rule and the cases which we have referred to, notably that of *Kimber v. Press Association*, *supra*. If this was not judicial action it would be difficult to say what would be, short of a full trial of the case. Although the motion was in chambers, still, under our practice, as all such motions and interlocutory orders are made in chambers, technically we cannot say that it was not in court. The statutes provide for such motions to be made to the court, and the provisions about the court "in chambers" are simply to distinguish such proceedings from those of the Appellate Division sitting *in banc*. We therefore decide that the plea sets out a sufficient statement of a proceeding in the court.³

As to the second question, to bring the plea within the rule of

³ Accord: *Beiser v. Scripps-McRae Publishing Co.*, 113 Ky. 383 (1902), application before a Justice of the Peace for permission to make an affidavit for the purpose of instituting a prosecution held to be a judicial proceeding, and this though the matter is not within the jurisdiction of the justice. *Lee v. Union Publishing Co.*, 209 N. Y. 245 (1913).

A mere complaint to the police is not a judicial proceeding, *Jastrzembski v. Marxhausen*, 120 Mich. 677 (1899), and see *McCabe v. Cauldwell*, 18 Abb. Prac. 377 (N. Y. 1865), to the effect that a report of proceedings before a grand jury are not privileged. A report of what was done and said at an

full and fair report, the plea is bad upon its face. It avers that what is published was only a part of the bill, and this part, so far as shown, was only the four paragraphs charging fraud. It does not aver that the defendants gave a full and fair report, even in substance, of the allegations and facts set out in the bill. The plea rests upon the fact that, as the bill had been before a judge in a judicial proceeding, it was a justification in publishing a part of it. That is not enough. If a garbled report of a trial, which may result in a vindication of one accused, is not privileged, much less should unfair extracts from pleadings be privileged. This doctrine is strongly set forth in caustic words by Endlich, J., in *Com. v. Costello*, 1 Pa. Dist. Rep. 745-752: "I prefer to rely upon the proposition, which seems to me incontestable, that, whether the proceeding be in a court of record or not, finished or unfinished, *ex parte* or

execution is not privileged, *Sanford v. Bennett*, 24 N. Y. 20 (1861).

Where the proceedings last more than one day, they may be reported from day to day as they progress, *Lewis v. Levy*, E. B. & E. 537 (1858). But if the proceedings are finally concluded, a report which states only the accusation and evidence against the accused and does not mention his subsequent triumphant acquittal, is not privileged, *Grimwade v. Dicks et al.*, 2 Times L. R. 627 (1886).

The report need not be verbatim, it is enough if it is substantially fair and accurate, Campbell, C. J. in *Andrews v. Chapman*, 3 C. & K. 286 (1853); *Connor v. Standard Publishing Co.*, 183 Mass. 474 (1903); *Boogher v. Knapp*, 97 Mo. 122 (1888); *D'Auxy v. Star Co.*, 64 N. Y. S. 283 (1900), and see *Willman v. Press Co.*, 49 App. Div. 35 (1900 N. Y.).

Only the report of the trial is privileged, *Stanley v. Webb*, 6 N. Y. Super. Ct. (4 Sandf.) 21 (1850); *Post Publishing Co. v. Moloney*, 50 Ohio St. 71 (1893); *Moore v. Leader Pub. Co.*, 8 Pa. S. C. 152 (1898), and unsworn statements by bystanders are no part of the proceedings, *Lynam v. Gowing*, 6 L. R. Ir. 259 (1880); and see *McGee v. Kinsey*, 1 Phila. 326 (Pa. 1852). Comment may not be interspersed, if any is made, it should be kept separate, Campbell, C. J., in *Andrews v. Chapman*, *supra*. And the report should express no opinion on the conduct, guilt or motives of the parties, witnesses, Court or counsel, *Rex v. Fisher*, 2 Camp. 563 (1811); *Lewis v. Walter*, 4 B. & Ald. 605 (1821); *Cass v. New Orleans Times*, 27 La. Ann. 214 (1875); *Scripps v. Reilly*, 38 Mich. 10 (1878); and see *Brown v. Providence Telegram*, 25 R. I. 117 (1903), and *Phister v. Sentinel Co.*, 108 Wis. 572 (1901); nor may it draw untrue inferences, *Hayes v. Press Co.*, 127 Pa. St. 642 (1889), a statement of a judgment entered against plaintiff, published under the headline "Merchant Embarrassed." Nor may it impute perjury to a party or witness, *Stiles v. Nokes*, 7 East 493 (1806); *Rosenberg v. Nesbitt*, 14 N. Y. St. 248 (1888); *Godshalk v. Metzgar*, 23 W. N. C. 541 (Pa. 1889). Conspicuous headlines are permissible if a fair index to the report, *Lawyers Co-operative Publishing Co. v. West Publishing Co.*, 32 App. Div. 585 (1898 N. Y.), but not if misleading, *Hayes v. Press Co.*, *supra*, or if they assume the guilt of a person accused, *Dorr v. United States*, 195 U. S. 138 (1904); *Pittock v. O'Neill*, 63 Pa. St. 253 (1869); and a fair and accurate report does not lose its privilege because accompanied by true information as to the parties involved, *Johns v. Press Pub. Co.*, 61 N. Y. Super. Ct. 207 (1892).

When the report stated that a certain fact "appeared in evidence" when it was merely asserted in a speech by counsel, it was held a matter for the jury to determine whether the report was a fair one, *Ashmore v. Borthwick*, 2 Times L. R. 113-209 (1885), and see *Hutchinson v. Robinson*, 21 N. S. Wales L. R. 130 (1900).

The burden of proving the report to be fair and accurate is on the defendant, the burden of showing it was published maliciously is on the plaintiff, Lord Esher in *Kimber v. Press Assn.*, L. R. 1893, 1 Q. B. 65, p. 71.

otherwise, no individual and no newspaper has the right to publish mere arbitrary selections consisting of those portions which impute crime or moral turpitude to, or cast ridicule or odium upon, the party to whom they refer, and commending themselves only by what is sometimes called spiciness, but is more properly denominated filth, or by reason of the fact that they tickle the morbid appetite of perverted human nature, which delights in the spectacle of another's disgrace."⁴

Upon this ground, therefore, the demurrer to the plea is sustained, and the case will be remitted to the Common Pleas Division for further proceedings.

SWEET v. POST PUBLISHING CO.

Supreme Judicial Court of Massachusetts, 1913. 215 Mass. 450.

MORTON, J. This is an action of tort to recover damages for the publication of an alleged libel upon the plaintiff, an attorney at law, in the "Boston Post" of August 13, 1907, a newspaper published by the defendant. The article complained of purported to give the names of six persons who had been indicted by the Suffolk County grand jury for conspiracy to defraud persons unknown and circumstances connected with their arrest. Amongst the names given as those of the persons indicted and arrested was that of the plaintiff. There was also a paragraph in the same article giving particulars as to the age, residence and profession of "Mr. Sweet," which was descriptive of the plaintiff in the particulars mentioned. The article was printed in what may be fairly described as a highly sensational manner. The declaration was in three counts. The first count was in statutory form. The second and third counts averred that the plaintiff was an attorney at law and that the alleged libel had greatly injured him in his reputation and had caused him great loss and damage in his profession. The answer admitted publication but denied any malice, and set up in substance that the article was published with reasonable care, on a privileged occasion, about another person whose name was similar to that of the plaintiff, but that in spite of such a care a mistake occurred and that on discovering the mistake the defendant promptly published a retraction.

There was a verdict for the plaintiff and the case is here on exceptions by the defendant to a matter of evidence and to the refusal of the presiding judge to give certain rulings asked for and to certain instructions that were given.

⁴ *Accord: Saunders v. Mills*, 6 Bing. 213 (1829); *Lewis v. Walter*, 4 B. & Ald. 605 (1821); *Pinero v. Goodlake*, 15 L. T. 676 (1867), the whole or part of the evidence not given.

But the summing up of the judge may always be published separately—it is a distinct part of the proceedings not affected by others—and is presumably a fair summary, *Milissich v. Lloyds*, 46 L. J. C. P. 404, 36 L. T. 423 (1877), *McDougall v. Knight*, L. R. 17 Q. B. Div. 636, L. R. 14 App. Cases 194 (1889).

It was stated at the trial by the plaintiff's attorney that no claim of express malice was made.

The principal contention of the defendant is that the occasion was one of privilege or qualified privilege, and that it is not liable for the consequences of a mistake honestly made in a *bona fide* attempt, in the exercise of reasonable care and diligence, to get at the facts for publication.

The investigation and report by the grand jury constituted a judicial proceeding, and, in the absence of express malice, a fair and correct report of it by the defendant in the newspaper published by it was privileged. *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318. *Kimball v. Post Publishing Co.*, 199 Mass. 248, 85 N. E. 103, 19 L. R. A. (N. S.) 862. The privilege attaching to such reports rests, however, upon a somewhat different ground from that on which privileged communications between private persons rest. In them the person making the communication has an interest to protect or a duty to perform, or his relation to the party to whom the communication is made is of a confidential nature, and the law holds that in such cases, if what is said or written is communicated in good faith, in the belief that it is true, and with no malevolent motive and for the purpose of protecting or promoting his interest, or in the performance of a duty incumbent upon him, social or legal or moral, and is justified or required by the nature of the relations existing between him and the person to whom the communication is made, and does not go beyond what is fairly warranted by the occasion, the communication is privileged. But no duty rests upon the publishers of a newspaper to report judicial proceedings, and their interest in such matters is only that which all the rest of the community has. It is for the interest of every one that crime should be detected and punished, and every one has the highest interest in whatever pertains to the proper administration of justice. It is upon these grounds that the reports of judicial proceedings fairly and correctly made are privileged. *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318. *Kimball v. Post Publishing Co.*, 199 Mass. 248, 85 N. E. 103, 19 L. R. A. (N. S.) 862; *Kimber v. The Press Association, Ltd.*, (1893) 1 Q. B. 65. In order to be privileged such reports must be not only fair and impartial, but they also must be accurate. The same principle which requires that they should be fair and impartial requires that they should be accurate, at least in regard to all material matters. *Kimber v. The Press Association, Ltd.*, *supra*. A distorted report cannot in the nature of things form the basis for a correct judgment. In a sense it may make no difference to the public so far as the course of judicial proceedings is concerned, whether it is John Smith or John Jones who is arrested. But the administration of justice would be a farce or worse than a farce if the guilty escaped and the innocent were punished, or if the rights of parties were determined in a manner in which according to plain principles of justice they should not be. It is of the highest consequence, therefore, in order to enable the public to judge rightly, that a report of judicial proceedings should be not only fair and

impartial but should be accurate also. If the report had to be accurate, then the defendant is not protected by the alleged privilege. For, admittedly, the plaintiff was the person indicted. Nor can the defendant avail itself of the doctrine laid down in *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856, that in order to render a defendant liable the libel must have been published of and concerning the plaintiff, and it is not to be deemed to have been so published if through mistake another person than the one intended is named. It was in effect conceded at the trial that the plaintiff was the person meant although the naming of him was due to a mistake, and the presiding judge so stated in his charge without any objection being made thereto.

The defendant contends, however, that it is not liable and is entitled to avail itself of the privilege extended to fair, impartial and accurate reports of judicial proceedings if it exercised reasonable care and diligence in endeavoring to ascertain what the facts were before it published the report and the mistake occurred in spite of such care and diligence and was an honest mistake. It would seem that the defense was disposed of, so far at least as this commonwealth is concerned, by the case of *Burt v. Advertiser Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97, where it was held that the privilege did not extend to statements made with reasonable cause to believe them to be true. As was said in that case, "A person publishes libelous matter at his peril." A newspaper as a purveyor of news and information of interest to the public, stands no differently in respect to liability from any other medium of communication. No doubt when a person acts in the performance of a duty or in regard to a matter where his interest is involved, he may justify by showing that he had reasonable and probable cause to believe what he published and that he acted bona fide and in the belief that what he published was true. In such a case he will be protected by the privilege which attaches to what he publishes from the consequences of an honest mistake. In the present case, however great the interest of the public in the doings of the grand jury might have been, there was, as already observed, no duty legal or social or moral resting upon the defendant to publish a report of them, and it had no such legal interest to be protected or promoted as to justify it in the publication of what otherwise would be a libel. It does not follow that because the public had an interest in knowing what the grand jury did that it was the defendant's duty to inform them.¹

It follows from what has been said that the evidence which was offered of the examination of the city directory by the night city editor "as bearing upon the care which we took in and about the publication of this article" was rightly excluded. Whether it would have been admissible on the question of damages it is not necessary to consider. The purpose for which it was offered was limited to that expressed above, and the ruling was based on its competency for that purpose.

¹ Accord: *Shelly v. Dampman*, 1 Pa. S. C. 115 (1896).

SECTION 4.

The Right to Comment upon Matters of Public Interest. ("Fair Comment.")

SIR JOHN CARR, KNIGHT, v. HOOD.

Court of King's Bench, at Nisi Prius, 1808. Reported in note to Tabart v. Tipper, 1 Campbell, 353.

The plaintiff, who had written three books of travel, brought an action of libel against the defendant, who had published a parody on one of them. The parody ridiculed the book and also contained a rather gross caricature of the author, depicting him leaving Ireland with his wardrobe in a handkerchief and a servant laden with three immense volumes, one marked with the name of one of the plaintiff's productions. He alleged that in consequence a publisher, who was in treaty for his fourth production, refused to publish it, to his damage £600.¹

Plea, not guilty.

LORD ELLENBOROUGH, as the trial was proceeding, intimated an opinion, that if the books published by the defendant only ridiculed the plaintiff as an author, the action could not be maintained.

Garrow for the plaintiff allowed, that when his client came forward as an author, he subjected himself to the criticism of all who might be disposed to discuss the merits of his works; but that criticism must be fair and liberal; its object ought to be to enlighten the public, and to guard them against the supposed bad tendency of a particular publication presented to them, not to wound the feelings and to ruin the prospects of an individual. If ridicule was employed, it should have some bounds. While a liberty was granted of analyzing literary productions, and pointing out their defects, still he must be considered as a libeller, whose only object was to hold up an author to the laughter and contempt of mankind. The object of the book published by the defendants clearly was, by means of immoderate ridicule, to prevent the sale of the plaintiff's works, and entirely to destroy him as an author. In the late case of *Tabart v. Tipper*, his lordship had held that a publication by no means so offensive or prejudicial to the object of it, was libellous and actionable.

LORD ELLENBOROUGH. In that case the defendant had falsely accused the plaintiff of publishing what he had never published.² Here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer, in exposing the

¹The statement of facts alleged in the plaintiff's declaration is much condensed.

²*Merivale v. Carson*, L. R. 20 Q. B. D. 275 (1887), caustic criticism of play and author based on misstatement of its plot and characters; *Thomas v. Bradbury, Agnew & Co.*, L. R. 1906, 2 K. B. 627, attack on a biographer

follies and errors of another, may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuria*. Where is the liberty of the press, if an action can be maintained on such principles? Perhaps the plaintiff's *Tour Through Scotland* is now unsaleable;—but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir *Robert Filmer* after he had been refuted by Mr. *Locke*? But shall it be said that he might have sustained an action for defamation against that great philosopher, who was laboring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their composition be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Show me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship,* and I shall be as ready as any Judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule.

The *Attorney General* having addressed the jury on behalf of the defendants—

LORD ELLENBOROUGH said: Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance.⁴ If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purpose of slander, that would have been libellous; but no passage of this sort has been produced; and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for aught I know, very valuable; but whatever their merits, others have a right to pass their judgment upon them—to censure them if

for his misuse of "his abundant materials," which were in fact very scanty; *Belknap v. Ball*, 83 Mich. 583 (1890), candidate for congress erroneously reported as having made a speech showing ignorance alike of grammar and public questions; *Stile v. Nokes*, 7 East 493 (1806); *Risk Allah Bey v. Whitehurst*, 18 L. T. (N. S.) 615 (1868); *Purcell v. Sowler*, L. R. 2 C. P. D. 215 (1877), comment upon garbled and distorted reports, much of which was pure invention, of judicial proceedings and meetings of public boards, etc.

*Compare Lord Tenterden, C. J. in *MacLeod v. Wakley*, 3 C. & P. 311 (1828); and *Dunne v. Anderson*, 3 Bing. 88 (1825).

⁴But criticism of private letters or privately circulated productions of public men, authors, artists or scientists is not with the protection of fair comment, *Collins, M. R., Thomas v. Bradbury, Agnew & Co.*, 1906, 2 K. B. 627, and *Pollock, C. B., Gathercole v. Miall*, 15 M. & W. p. 334. Nor is criticism of the private acts of a private person, *Snyder v. Fulton*, 34 Md. 128 (1870).

they be censurable, and to turn them into ridicule if they be ridiculous.⁵ The critic does a great service to the public, who writes down any vapid or useless publication such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury because it is a loss which the party ought to sustain. It is in short the loss of fame and profits to which he was never entitled.⁶ Nothing can be conceived more

⁵ *Accord: Strauss v. Francis*, 4 F. & F. 939, 1107 (1866); *Devereux v. Clarke*, L. R. 1891, 2 Q. B. 582; *Thomas v. Bradbury, Agnew & Co.*, L. R. 1906, 2 K. B. 627; *Dowling v. Livingstone*, 108 Mich. 321 (1896); *McDonald v. Sun Publishing Co.*, 111 App. Div. (N. Y.) 467 (1906), *semble*; *Triggs v. Sun Publishing Co.*, 179 N. Y. 144 (1904), *semble*, criticisms of literary productions; *Merivale v. Carson*, L. R. 20 Q. B. D. 275 (1887); *McQuire v. Western Morning News*, L. R. 1903, 2 K. B. 100; *Cherry v. Des Moines Leader*, 114 Iowa 298 (1901); *Fry v. Bennett*, 5 Sandf. 54 (N. Y. 1851); *Dibdin v. Swan*, 1 Esp. 28 (1792); *Gott v. Pulsifer*, 122 Mass. 235 (1877), criticisms of plays, acting, theatrical management and songs publicly sung, or other public exhibitions, *Soane v. Knight*, M. & M. 74 (1827); *Whistler v. Ruskin*, London Times, Nov. 27 and 28, 1878, cited in *McDonald v. Sun Publishing Co.*, 111 App. Div. (N. Y.) 467 (1906); architecture and painting, *Kelly v. Sherlock*, L. R. 1 Q. B. 686 (1866), *Klos v. Zahorik*, 113 Iowa 161 (1901), sermons publicly preached, but see *Gathercole v. Miall*, 15 M. & W. 319 (1846); *Hunter v. Sharpe*, 4 F. & F. 983 (1866); *Henwood v. Harrison*, L. R. 7 C. P. 606 (1872); *Dakhyl v. Labouchere*, L. R. 1908, 2 K. B. 325, n; scientific or medical discoveries.

Every scheme, in which the public are asked to participate or patronize, every trade or profession openly soliciting public patronage, every private enterprise which serves public needs or from its size affects the public, is regarded as open to fair criticism, *Williams v. Chicago Herald*, 46 Ill. App. 655 (1893); *Inland Printer Co. v. Economical, etc., Co.*, 99 Ill. App. 8 (1901); *Crane v. Waters*, 10 Fed. 619 (1882), construction, financial and operative management of a railroad; *Archer v. Ritchie & Co.*, 18 Rettie 719 (Sc. Ct. Sess. 1891), management of the Order of Templars; *South Hetton Coal Co. v. North Eastern News Assn.*, L. R. 1894, 1 Q. B. 133, sanitary condition of a village and the houses provided therein for two thousand work people. As showing the tendency to widen the field of permissible criticism, compare with the last case *Gathercole v. Miall*, 15 M. & W. 319. In *Haynes v. Clinton Printing Co.*, 169 Mass. 512 (1897), it is doubted whether the guilt or innocence of one arrested for a crime is matter for public comment.

⁶ See the very acute criticism of Spencer Bower, K. C., in *Actionable Defamation*, pp. 380-384, especially p. 383.

⁷ In *Fraser v. Berkeley*, 7 C. & P. 621 (1836), it was held to be a libel and not "fair comment" to call an author "liar," "coward" and "pimp"; *Triggs v. Sun Publishing Co.*, 179 N. Y. 144 (1904), statements in regard to the domestic life of a university professor, made in a criticism of a lecture publicly given by him.

So the private character and morals of an artist or actor, except as exhibited in or affecting the character or quality of his public productions, is not a proper subject of "fair comment," *Gathercole v. Miall*, 15 M. & W. 319 (1846), p. 338; *Duplany v. Davis*, 3 T. L. R. 184 (1886).

The private acts of a public officer or candidate for office is a subject of public interest and as such may be fairly commented upon, if, but only if, they tend to show the presence or absence of some trait of character incompatible with or necessary to a proper discharge of his duties. *Seymour v. Butterworth*, 3 F. & F. 372 (1862); *Bruce v. Leisk*, 19 Rettie 482 (Sc. Ct. of Sessions 1892), *semble*, with which compare *Alderson B.* in *Gathercole*

threatening to the liberty of the press than the species of action before the Court. We ought to resist an attempt against free and liberal criticism at the threshold. The Chief Justice concluded by directing the jury, that if the writer of the publication complained of had not travelled out of the work he criticised for the purpose of slander, the action would not lie; but if they could discover in it any thing personally slanderous against the plaintiff, unconnected with the works he had given to the public,¹ in that case he had a good cause of action, and they would award him damages accordingly.

Verdict for the defendants.

CAMPBELL *v.* SPOTTISWOODE.

Court of Queen's Bench, 1863. 3 Best & Smith, 769.

COCKBURN, C. J.¹ I am of opinion that there ought to be no rule. The article on which this action is brought is undoubtedly libellous. It imputes to the plaintiff that, in putting forth to the public the sacred cause of the dissemination of religious truth among the heathen, he was acting as an impostor, and that his purpose was to put money into his own pocket by obtaining contributions to his newspaper. The article also charges that, in furtherance of that base and sordid purpose, he published in his newspaper the name of a fictitious person as the authority for his statements, and still further that, with a view to induce persons to contribute towards his professed cause, he published a fictitious list. These are serious imputations upon the plaintiff's moral as well as public character.

It is said, on behalf of the defendant, that, as the plaintiff addressed himself to the public in a matter, not only of public, but of universal interest, his conduct in that matter was open to public criticism, and I entirely concur in that proposition. If the proposed scheme was defective, or utterly disproportionate to the result aimed at, it might be assailed with hostile criticism. But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation.

In the present case, the charges made against the plaintiff were unquestionably without foundation. It may be that, in addition to the motive of religious zeal, the plaintiff was not wholly insensible to the collateral object of promoting the circulation of his newspaper,

v. Miall, 15 M. & W. 319 (1846), and *Broadbent v. Small*, 2 Vict. L. R. (Law) 121 (1876), *Wood v. Boyle*, 177 Pa. St. 620 (1896).

¹The concurring opinion of Crompton J. and part of that of Mellor J. are omitted.

but there was no evidence that he had resorted to false devices to induce persons to contribute to his scheme. That being so, Mr. *Bovill* is obliged to say that, because the writer of this article had a bona fide belief that the statements he made were true, he was privileged. I cannot assent to that doctrine. It was competent to the writer to have attacked the plaintiff's scheme; and perhaps he might have suggested, that the effect of the subscriptions which the plaintiff was asking the public to contribute would be only to put money into his pocket.² But to say that he was actuated only by the desire of putting money into his pocket, and that he resorted to fraudulent expedients for that purpose, is charging him with dishonesty; and that is going farther than the law allows.

It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honor with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honor and character, and made without any foundation. I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable.³ But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest.⁴

The cases cited do not warrant us in going that length. In *Paris v. Levy*, 2 F. & F. 71, there may have been an honest and well-founded belief that the man who published the handbill which was commented upon, could only have had a bad motive in publishing it, and if the jury were of that opinion, the writer who attacked him in the public press would be protected. We cannot go farther than that.

² But see *Boal v. Scottish Catholic Printing Co.*, 1907 Scottish Ct. of Session Rep. 1120, where a query, as to what guarantee there was that money subscribed for a home would not go to the private profit of those soliciting the subscriptions, was held to go beyond fair comment.

³ Compare the language of the same judge in *Morrison v. Belcher*, 3 F. & F. 614 (1863); *Hedley v. Barlow*, 4 F. & F. 224 (1865); *Risk Allah Bey v. Whitehurst*, 18 L. T. (N. S.) 615 (1868), and *Reg. v. Tanfield*, 42 J. P. 423 (1878).

⁴ See *Pallas, C. B. in Lefroy v. Burnside*, 4 L. R. Ir. 556 (1879), p. 567, to the effect that no reasonable inference of guilt can be drawn from the fact that "a man having the means of committing a crime and the crime being in fact committed," and *Haynes v. Clinton Printing Co.*, 169 Mass. 512 (1897), and *Commercial Publishing Co. v. Smith*, 149 Fed. 704 (C. C. A. 6th Cir. 1907), in which the plaintiff's guilt was insinuated or assumed upon insufficient grounds.

BLACKBURN, J. I also think that the law governing this case is so clearly settled that we ought not to grant a rule. It is important to bear in mind that the question is, not whether the publication is privileged, but whether it is a libel. The word "privilege" is often used loosely, and in a popular sense, when applied to matters which are not, properly speaking, privileged. But, for the present purpose, the meaning of the word is that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else. For instance, a master giving a character of a servant stands in a privileged relation. In these cases no action lies unless there is proof of express malice. If it could be shown that the editor or publisher of a newspaper stands in a privileged position, it would be necessary to prove actual malice. But no authority has been cited for that proposition; and I take it to be certain that he has only the general right which belongs to the public to comment upon public matters, for example, the acts of a minister of state; or, according to modern authorities somewhat extending the doctrine, where a person has done or published anything which may fairly be said to invite comment, as in the case of a handbill or advertisement: *Paris v. Levy*, 2 F. & F. 71. In such cases every one has a right to make fair and proper comment; and, so long as it is within that limit, it is no libel.

The question of libel or no libel, at least since Fox's Act (32 G. 3, C. 60), is for the jury; and in the present case, as the article published by the defendant obviously imputed base and sordid motives to the plaintiff, that question depended upon another—whether the article exceeded the limits of a fair and proper comment on the plaintiff's prospectus; and this last question was therefore rightly left to the jury. Then Mr. *Bovill* asked that a further question should be left to them, viz: whether the writer of the article honestly believed that it was true; and the jury have found that he did. We have to say whether that prevents an action being maintained. I think not. Bona fide belief in the truth of what is written is no defense to an action; it may mitigate the amount, but it cannot disentitle the plaintiff to damages. Moreover that honest belief may be an ingredient to be taken into consideration by the jury in determining whether the publication is a libel, that is, whether it exceeds the limits of a fair and proper comment; but it cannot in itself prevent the matter being libellous.

MELLOR, J. I am of the same opinion. I should be unwilling to limit the right of a writer in a newspaper, or any other individual, to canvass any scheme, even though it be a scheme of public benevolence. But giving full latitude to fair comment, so soon as a writer imputes that the person proposing the scheme is doing it from a base and sordid motive, and is putting forth a list of fictitious subscribers, in order to delude others to subscribe, it cannot be said to be within the limits of fair criticism.

If comment is beyond the limits of fair criticism it becomes a

libel. And I agree that the question in this case is, libel or no libel. If the words were used upon a justifiable occasion, no action could be maintained; for the interest and exigencies of society require that there should be free communication between parties who have a duty, either moral or legal, to discharge toward each other, as in the common case of a master giving the character of a servant, in which defamatory words are privileged unless proved to be false and malicious. But in the present case there was no legal or moral duty on the writer to make these imputations upon the plaintiff.

NONPAREIL CORK MANUFACTURING CO v. KEASBEY
& MATTISON CO.

Circuit Court, E. D. Pennsylvania, 1901. 108 Federal Reporter 721.

Action for libel. On demurrer to plaintiff's statement.

DALLAS, Circuit Judge.¹ It is alleged that the defendants published a circular letter containing the following:

"Cork has been recently exploited in various cities of the United States as a steam pipe and boiler covering. When it was first presented for our consideration, we expressed the opinion that, it being organic, it would carbonize and burn, as hair felt does; that under the most favorable conditions it carried with it an element of danger; and that it never could become a permanent standard material for the covering of heated surfaces. We refer you herein, without further comment, to localities and people that have had practical experience with cork covering, and, from the nature of the reports we have concerning the same, feel warranted in continuing to believe that our opinion, as above stated, as to cork's value for covering steam pipes and boilers, was correct."

As to this matter the innuendo is:

"Meaning and intending thereby that the covering so manufactured and sold by the plaintiff was inferior in quality and character to other coverings, and especially to the coverings manufactured and sold by the defendants, and that it was unfitted for the purpose for which it was sold, and that the use thereof was dangerous."

The action is not strictly an action of libel, but a special action on the case for disparaging the plaintiff's goods; and, with reference to this view of it, I deem it necessary only to repeat what was said by Lord Denman in *Evans v. Harlow*, 5 Q. B. 624:

"A tradesman who offers goods for sale exposes himself to observations of this kind, and it is not by advertising them to be false, scandalous, and malicious and defamatory that the plaintiff can found a charge of libel upon them. To decide so would open a very

¹ Only so much of the opinion is given as relates to the disparaging imputations upon the plaintiffs' wares.

wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action."²

From the whole declaration it plainly appears that what the defendants are charged with is really but the expression of an unfavorable opinion of the goods of its competitor. But such expressions are not uncommon among rivals in trade, and their correctness in each instance is for determination by those whose custom is sought, and not by the courts. Judgment for defendant.

CLIFTON *v.* LANGE.

Supreme Court of Iowa, 1899. 108 Iowa, 472.

Appeal from district court. Pocahontas county; W. B. Quar-
ton, Judge.

Action at law to recover damages caused by the publication by the defendant, in a weekly newspaper, of the following, of and concerning the plaintiff: "Modern Justice (?). Should two men hold up a third man on the streets of Laurens in broad daylight, and rob him of \$65 to \$75, the robbers would be sure to serve a term in the penitentiary, and the authorities might find it difficult to prevent them from being lynched. Yet modern justice, in the disguise of law, committed a crime equally as great a few days ago, and the methods employed and tactics plied were no more dishonorable than highway robbery. The parties who did the holding up were J. S. Clifton, a justice of the peace, and J. W. Convy, a constable, and the party they attempted to rob was Chas. Snider; and they probably would have succeeded, had not the matter become public, and outsiders came to his rescue in time to appeal to a higher court, where snap judgments are not engineered by the aid of the court, and save his home from being sold on a judgment rendered by two vultures sitting ready to pounce upon and divide the spoils. Did J. S. Clifton do as he would like to be done by if he was in Snider's place? Did he give both sides justice? Was there any honorable act done by the justice from start to finish? If so, what? Could the James gang have done worse, had they presided in Clifton's place? Take down these signs of 'Justice,' and print in large let-

²In *Evans v. Harlow*, *supra*, the defendant's circular stated that "those who have already adopted (the plaintiff's) lubricators, . . . will find that the tallow is wasted instead of being effectually employed." See *Christiancy, J.*, in *Weiss v. Whittemore*, 28 Mich. 366 (1873), "both the plaintiff and the defendant were at entire liberty to recommend that for which they were respectively the agents, as superior to the other; to point out all its advantages, as well as all the defects of the other, so long as they confined themselves to their own views, and such proofs as they were able to offer, and a reasonable latitude should, of course, be allowed for each to puff his own."

ters, and hang there instead, the more appropriate sign of 'Modern Crucifixion.' Honorable justices and constables are essential and necessary to every community, but when they become hawks and vultures, perched in dark corners waiting for some weakling to fall by the wayside, and pounce upon them and devour them because they are weak, poor and helpless, then, the sooner they are exposed and receive deserved punishment, the better it will be. Now, right here is where the dishonorable act of the court comes in, and where the gross and dishonest prejudice of J. S. Clifton, the justice of the peace, helped in the rotten and infernal steal. He knew that Paige was Snider's attorney; he knew that, if Snider was able to conduct the case himself, he would not have hired an attorney, and as Paige was the first attorney to appear in the case and had only left the room to get authorities to cite, why did he not wait until Paige got back? Why did he not give the defendant one-tenth of the courtesy he had extended to the plaintiff by running around town and apprising him that the case would be contested on the part of the defendant? Why did he not do that, we ask? He shows by his act that he was a party to the theft and dishonorable act."

Verdict and judgment were rendered in favor of the plaintiff for \$200. Defendant appeals.

GIVEN, J. In view of the question involved, we regret that the case is submitted without argument for appellee. The publication is conceded to be libelous and actionable per se. By the first division of the answer, we have the single issue whether it was maliciously published, and it was upon this issue that the case was submitted to the jury. The defendant, "for a second and complete defense. . . . states that every fact charged" in the publication to have been done by plaintiff "was the truth, and in fact done as therein charged." Such a plea must be as broad as the charge made. This is not so. It merely pleads as true what are stated to have been the acts of the plaintiff, and does not plead the truth of the libelous charges. To plead that part of the charge is true is not sufficient; the entire libelous charge must be alleged to be true; and, if this was the defendant's purpose, he should have pleaded it in unmistakable language.

In the fifth division of the answer it is alleged, as a complete defense, that said publication is privileged. The law is well settled that a fair and true publication, without malice, of a prejudicial proceeding, or of anything stated as part thereof, or "a criticism of an official act of a public officer, made without malice, and not containing any attack upon his private character," is privileged. Townsh. Sland. & L., § 208, and note; *McBee v. Fulton*, 47 Md. 403; *McAllister v. Press Co.*, (Mich.) 43 N. W. 431; 13 Am. & Eng. Enc. Law, 419. The publication admitted to have been made is not privileged, for the reason that it contains an attack upon the private character of the plaintiff, and it is not, therefore, a privileged publication; and

there was no error in sustaining the demurrer to the fifth division of the answer.¹

MCDONALD v. THE SUN PRINTING & PUBLISHING CO.

Supreme Court of New York, 1904. 45 N. Y. Misc. Rep. 441.

GAYNOR, J. The alleged defamatory article gives the following facts: The plaintiff was employed in the Bureau of Education of the national government at Washington for several years under the title of "Specialist in Education as a Preventative of Pauperism and Crime." He published a personal advertisement in newspapers that a gentleman of high social and university position desired correspondence with young educated women of high social and financial position, and that they must give detailed accounts of their lives. He gave no name, but a lock-box in the Post Office at Washington, D. C., as his address. The plaintiff corresponded with the women who answered (which his evidence shows to have been a large number), and got them to write all he could concerning themselves. He also made appointments with some of them (he testified forty to fifty) in streets and public places, and in some cases in their homes, or other private houses, and met them and talked with them. He then wrote a book with the title "Girls Who Answer Personals," out of the materials he had thus collected, and sold it for fifty cents a copy through his lock-box. On the title page he put "Dr." before his name, but he was not a doctor of any kind.

The defendant put the book in evidence. It contains many of

¹ *Accord: Bearce v. Bass*, 88 Maine 521 (1896), *semble*, in which a criticism of the bad construction of a building was held fair comment because it attacked only the work and not the personal character of the contractor; *Bee Publishing Co. v. Shields*, 68 Nebr. 750 (1903), suggestion that a district attorney's failure to prosecute gamblers was due to bribery; *Wofford v. Meeks*, 129 Ala. 349 (1900), in which it is intimated that to characterize a public officer's official acts, in terms usually reserved for accusations of crime, is not fair comment; compare *Speight v. Syme*, 21 Vict. L. R. (Law) 672 (1895); and see *Sweeney v. Baker*, 13 W. Va. 158 (1878), Note 3 to *Coleman v. MacLennan*, *ante*.

In many of the cases where it is stated, in various forms, that, while the fitness of a candidate or officer for the office as shown by his official or even private conduct may be discussed, neither improper motives nor criminality may be imputed to him, there was an untrue statement of his acts or conduct, or a general insinuation against or characterization of his conduct, in form perhaps comment, but without any, or, if any, an incomplete statement of the acts and conduct so characterized, *People v. Fuller*, 238 Ill. 116 (1909); *Russell v. Washington Post*, 31 D. C. App. 277 (1908); *Dauphiny v. Buhne*, 153 Cal. 757 (1908); and *Tanner v. Embree*, 9 Cal. App. 481 (1908), in which charges of gross official misconduct were called by the court attacks on the plaintiff's "personal character"; *Mattice v. Wilcox*, 147 N. Y. 624 (1895); *Upton v. Hume*, 24 Ore. 420 (1893), and see cases cited in *Coleman v. MacLennan*, *ante*, —, and notes thereto, and 23 Harv. L. R. 432, n. 2, and 433, n. 1 and 2.

the letters of the women who wrote to the plaintiff. It also gives the particulars of the personal interviews he had with some of them, including in some cases their physical appearance, manner and temperament. The rest of the book is made up of general matter and comment pertaining to the sexual instinct and the relation of the sexes.

There is no fact in dispute. This brings the case under the head that if the facts be undisputed, and different inferences may not be drawn from them, it is for the court to direct a verdict. I sent it to the jury on the question whether the inferences of fact drawn and expressed by the defendant, and upon which the charge of defamation depends, were reasonably possible and therefore permissible.

Those inferences are, in substance, that the conduct of the plaintiff and the book were a "scandal," "shameless," and that the plaintiff was a "prurient." Around these words cling all that was claimed to be or deemed defamatory on the trial.

The occasion of the defendant's criticism was that plaintiff was working to get Congress to pass a bill which he had prepared to establish in the Department of Justice a "laboratory for the study of the abnormal classes," with the object of having himself employed by the government to run it, he having been dropped from the Bureau of Education; all of which is revealed in the article sued upon.

The plaintiff claimed in the witness box on cross-examination that he collected the material, and wrote and circulated the book, from pure and worthy motives, solely in the interest of the study and development of the science of criminology, for the benefit of the human race. He said that his object was to study women who are at the border line between chastity and looseness, with a view to the future help and preservation of such women.

The plaintiff was holding his said position in the Bureau of Education when he did all of these things, but he did not do them for the government, or get permission therefor of those over him, or file the material he collected with the bureau in which he was employed, but used it for his own profit in the way already stated.

Though the plaintiff testified on cross-examination in respect of his motives and object, I did not and do not deem the evidence relevant or competent. On the contrary, the question is not whether he can now in the witness box convince a jury of the purity of his motives and object, but what inferences were and are permissible to the defendant or any one else in discussing his book and his conduct, and his personality as revealed thereby. It may be that the plaintiff is even able by his persuasive powers to now convince the defendant that in drawing the inferences from his book which it did unaided by his presence and explanation, it was mistaken, but that would be wholly immaterial. The question is, did his book and conduct justify such inferences?

Any one who publishes a book, or does any public act, challenges discussion and criticism. Every one has the right to indulge in such discussion and criticism freely and fully, and to draw inferences and express opinions on the facts in the same way. That his opinions and inferences are far fetched, high strung or severely chaste or moral, or contrary to other inferences or opinions that seem more reasonable, does not matter so long as there be a basis for them. The opinion of the smallest minority often becomes the opinion of a majority or of all. The prevailing opinion of one generation often becomes such an absurdity to the next, that the wonder then is how any one ever entertained it, as John Stuart Mill says. It is for this reason that the law gives full latitude in the expression of opinions on things of general concern. So long as such discussion and criticism keep within matters of reasonable opinion on the facts, they cannot be defamatory. If, on the contrary, the personal character of the individual be touched by false statements, or by aspersions with no facts to rest upon, the writer is on the common ground of defamation.

Criticism is no exception in the general law of defamation, though some *dicta* would lead one to suppose that it is. A critic is no more permitted to make false aspersions or statements of fact which are defamatory than any one else. Criticism is an expression of opinion on facts from which differences of opinion may reasonably arise, and if it sticks to that, it is not defamatory, no matter though it be severe, hostile, rough, caustic, bitter, sarcastic or satirical, for these are the weapons of criticism;¹ and no matter how different the opinion may be to the opinion of others, or of a majority, however great, provided it derives its color from the facts.

In the present case the plaintiff is charged with pruriency, scandal and shamelessness. This affects his personal character. If his book and his conduct lay him open to the charge, the defendant did not go outside the realm of criticism, and is not liable. If they do not, then the defendant is liable.

It is not always easy to determine whether the question pre-

¹ Compare *Merivale v. Carson*, L. R. 20 Q. B. D. 275 (1887), "Every latitude must be given to opinion and prejudice. Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated and obstinate his views, have said that which this criticism has said of the work criticized"—Lord Esher, pp. 280-281. "It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated or violent it may be. In the case of literary criticism it is not easy to conceive what would be outside of that region of fair criticism, unless the writer went out of his way to make a personal attack on the author"—Bowen, L. J., pp. 283-284. See *Triggs v. Sun Printing and Publishing Co.*, 179 N. Y. 144 (1904), where the critic was held to have gone out of his way to attack the author's personal characteristics.

sented, *i. e.*, the question whether the inference drawn and expressed by the defendant is a reasonably possible one, and therefore permissible, is one of law or one of fact, *i. e.*, a question to be decided by the court, or one to be decided by the jury. Cases could be imagined in which the question would be one of law. If, for instance, one should write advocating murder, it would be for the court to rule that the inference that he was a murderous character was permissible. Murder is an unmistakably defined crime, and there can be no doubt about what it is.

But what of pruriency? It is an elastic term. Matter and conduct which some people deem prurient other good people deem chaste. There is no fixed standard of pruriency. It is largely a matter of education and taste. And the same is true in respect of scandal and shamelessness.

Nevertheless, one may do or say or write things that are beyond question scandalous, shameless and prurient, and that would be a case presenting a question of law and not of fact. But I am fully convinced that the present is not such a case. I have looked over the book carefully, and considered the plaintiff's conduct, and I think the question was for the jury, *i. e.*, it was for them to say whether the inferences drawn by the defendants from the facts were reasonably possible and therefore permissible. If the inferences be false, *i. e.*, such as the facts will not bear at all, then they are defamatory. It is not enough in a given case that the jury disagree with the inferences.² The question is whether they may be reasonably drawn, as matter of argument, although other and opposite and, in the opinion of many or most people, better inferences may also be drawn.

The case of *Whistler v. Ruskin* serves as an illustration. There the greatest English art critic of the last century wrote of one who bids fair to rank as the greatest English artist of the last century: "For Mr. Whistler's own sake, no less than for the gallery of the purchaser, Sir Coutts Lindsay ought not to have admitted works into the gallery in which the ill-educated conceit of the artist so nearly approached the aspect of wilful imposture. I have seen and heard much of cockney impudence before now, but never expected to hear a coxcomb ask 200 guineas for flinging a pot of paint in the public's face." The words "wilful imposture" were held by the jury (for it was left to the jury) to be a false aspersion or statement of fact involving the personal integrity of the plaintiff, and not an expression of opinion concerning his art or him as an artist. An inference of imposture was held not permissible by the jury. It was not taken to itself as a question of law by the court, although it would seem that the inference to be drawn from the picture and the fact of its sale by the plaintiff for a work of his art was closer to being a question of law than is the question here; for whether it was a work of art instead of a daub was necessarily a matter of opinion, and the

² Accord: *McQuire v. Western Morning News*, L. R. 1903, 2 K. B. 100.

artist was entitled to his opinion, and to rate the value of his work on his opinion.

The motion to direct a verdict, and also the motion for a new trial, are denied.³

HUNT v. STAR NEWSPAPER CO., LTD.

Court of Appeal, 1908. Law Reports, 1908, 2 King's Bench Div. 309.

COZENS-HARDY, M. R. This is an application for a new trial on the ground of misdirection. The action was for libel, based upon two articles in the *Star* and the *Morning Leader* newspapers. The articles complained of related to the plaintiff, who was deputy returning officer at the Caxton Hall polling station at the election for the London County Council in March, 1907. I do not think it necessary to read the articles in full. The article in the *Star* is headed "In Westminster. Serious Allegations made by Progressive Candidates;" and the article in the *Morning Leader* is headed, "Obstructing Progressives. Extraordinary Action by Westminster Polling Official." Each article stated certain alleged facts with reference to what took place in the Caxton Hall and, as the plaintiff asserts, charged the plaintiff with not having acted honestly in the discharge of his statutory duties as deputy returning officer, and as having been influenced by political bias with intent to prejudice the Progressive candidates. The defendants pleaded, as a separate defense, that in so far as the said words consisted of comment the same were fair and bona fide comment upon a matter of public interest and importance. The learned judge dealt with the plea of fair comment as follows: "If a newspaper publishes exactly what took place with no comment whatever, they would be justified in so doing as a matter of public interest, but if they add to that comment of their own, then the question is whether that comment was bona fide and fair comment, or whether it was comment which tended, as alleged here, to charge the plaintiff with improper conduct." And at the end of the summing up he says this: "If you come to the conclusion that they are libels and are such as would have a tendency to preju-

³ See *McDonald v. Sun Publishing Co.*, 111 App. Div. (N. Y.) 467 (1906), two later attacks by the same paper on the same plaintiff as in the principal case, the latter of them insinuating that his researches were merely a pretext for gratifying his indecent curiosity and lubricity, and *Triggs v. Sun Printing and Publishing Co.*, 179 N. Y. 144 (1904), in all of which the articles were held to go clearly beyond the limit of fair comment. In the last case it was said that "the critic . . . can not allow himself to run into reckless and unfair attacks merely for the purpose of exercising his power of denunciation;" compare the statement of Collins, M. R. in *McQuire v. Western Morning News*, L. R. 1903, 2 K. B. 100, that "Criticism can not be used as a cloak for mere invective."

A charge of plagiarism is undoubtedly an attack on the character of an author as author, and was held actionable in *Dibdin v. Swan*, 1 Esp. 28 (1792), and see *McLellan v. Dutton*, London Times, May 23 (1906), and Bower, Actionable Defamation, Appendix XII, sec. 6.

dice the plaintiff in his position of town clerk of Westminster and of presiding officer and deputy returning officer of the county council elections, then you must give him your verdict. Then the next question is, whether the defense is made out that the accounts given in these two articles of what happened at the Caxton Hall on this occasion were true in substance, and in fact, as far as they related to the details of what took place at the Caxton Hall. Then, as far as comment is concerned, you will consider whether that comment is fair and bona fide comment, or whether it is for the purpose of suggesting, as is alleged by the plaintiff, that he was acting in an improper way." I regret that no separate questions were left to the jury. A general verdict was found in favor of the plaintiff with £800 damages. Now it seems to me that the learned judge did not properly direct the jury as to the meaning and effect of the plea of fair comment. The words which I have read seem to indicate that that cannot be fair comment which tends to prejudice or to impute blame to the plaintiff. In my opinion that is not the law. I cannot do better than adopt the language of Kennedy, J., in *Joynt v. Cycle Trade Publishing Co.*, (1904) 2 K. B. 292, "The comment must... not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and, further, it must not convey imputations of an evil sort, except so far as the facts, truly stated, warrant the imputation." And in *Dakhyl v. Labouchere*, Lord Atkinson said: "A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn." In substance it seems to me that the issue of fair comment was not left to the jury. It is highly probable that the jury thought that the facts were not truly stated, in which case the verdict for the plaintiff would be plainly justified; but it is also possible that they thought that, although the facts were truly stated, they must, as the learned judge told them, find for the plaintiff, if in the view of the jury the articles in question imputed improper conduct to the plaintiff. In my opinion the defendants are entitled to have a new trial in which both the issues raised by them may be presented to a jury with a proper and adequate direction. There must be an order for a new trial, but under the circumstances I think the costs of this appeal, as well as of the first trial, should abide the result of the second trial.

FLETCHER MOULTON, L. J. With the greater part of the argument that was addressed to us by counsel for the appellants in this case I thoroughly disagree. That argument was based mainly upon an application of the language of the judgment in *Merivale v. Carson*, 20 Q. B. D. 275, at p. 231, to the case of the imputation or cor-

rupt or disgraceful motives to an individual, and the contention was that, if in his comment upon facts a writer attributed such motives to an individual, such language was covered by the plea of fair comment unless the views it expressed could not be held by any fair man, however prejudiced he might be and however exaggerated and obstinate his views. In my opinion this is a complete misapprehension of the law as laid down by that case, and is absolutely opposed to what is now settled law with regard to fair comment. The case of *Merivale v. Carson*, *supra*, related to a criticism upon a play, and not to a question of libel on personal character, and the language of the judgments in that case shows that both the eminent judges who decided it intended to deal with literary criticism. The law laid down by the decision in that case has, therefore, nothing to do with personal libels such as that imputation of disgraceful motives to an individual. In order to demonstrate this it is only necessary to quote what may be said to be the leading passage in the judgment of Lord Esher. He says: "What is the meaning of a 'fair comment'? I think the meaning is this. Is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what clearly would be beyond the limit. If, for instance, the writer attacked the private character of the author." With this language as applied to literary criticism, I fully agree, but it gives no support to the contention of the counsel for the appellants in the present case, seeing that we have here to deal with imputations of motives which unquestionably amount to attacks on the character of the plaintiff.

The law as to fair comment, so far as is material to the present case, stands as follows: In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment; see *Andrews v. Chapman*, (1853) 3 C. & K. 286. The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavorable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses. In this relation I must express my disagreement with the view apparently taken by the Court of Queen's Bench in Ireland in the case of *Lefroy v. Burnside*, 4 L. R. Ir. C.

L. 556, where the imputation was that the plaintiffs dishonestly and corruptly supplied to a newspaper certain information. The court treated the qualifications "dishonestly" or "corruptly" as clearly comment. In my opinion they are not comment, but constitute allegations of fact. It would have startled a pleader of the old school if he had been told that, in alleging that the defendant "fraudulently represented," he was indulging in comment. By the use of the word "fraudulently" he was probably making the most important allegation of fact in the whole case. Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment. In the next place, in order to give room for the plea of fair comment, the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails.

Finally, comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation. This is the language of Kennedy J. in *Joynt v. Cycle Trade Publishing Co.* It is based on the judgments in *Campbell v. Spottiswoode*, 3 B. & S. 769, a case of the highest authority, and is, in my opinion, unquestionably a true statement of the law. The only portion of the statement which requires examination is the phrase "except so far as the facts truly stated warrant the imputation." Speaking for myself, the words "warrant the imputation" can bear but one meaning, and that meaning is stated so plainly by Lord Atkinson in the opinion delivered by him in the case of *Dakhyl v. Labouchere*. In other words a libellous imputation is not warranted by the facts unless the jury hold that it is a conclusion which ought to be drawn from those facts. Any other interpretation would amount to saying that, where facts were only sufficient to raise a suspicion of a criminal or disgraceful motive, a writer might allege such motive as a fact and protect himself under the plea of fair comment. No such latitude is allowed by English law. To allege a criminal intention or a disreputable motive as actuating an individual is to make an allegation of fact which must be supported by adequate evidence. I agree that an allegation of fact may be justified by its being an inference from other facts truly stated, but, as Lord Atkinson says in the passage just quoted, in order to warrant it the jury must be satisfied that such inference ought to be drawn from those facts.

Applying this law to the facts of the present case, I would say, first, that I have a great doubt whether there is anything in the publication complained of which can fairly be called comment at all, unless it be the headlines of the second article. All the rest appears to me to purport to be statement of fact, and therefore, in my opinion, the defendants could only succeed by establishing their plea of justification with respect to it. I have great doubt, therefore, whether the learned judge ought to have allowed the issue of fair comment to go to the jury at all (except, perhaps, as to those headlines.) But the judge permitted it to go to the jury, and, therefore, he was bound to give them a proper direction as to it. In my opinion the

direction he gave was so expressed as to bear a meaning which might have misled the jury and affected their verdict, and as it was a general verdict, not distinguishing the issues, but giving a sum by way of damages in respect of both, we have no alternative but to send the case back for a new trial, because it is impossible to say to what extent the verdict may have been influenced by such misdirection.

BUCKLEY, L. J. Comment which tends to prejudice may still be fair; it may convey imputations of bad motive so far as the facts truly stated justify such an imputation. It is for the jury to say whether the facts justify the imputation or not. The fault here is that that question has never properly been left to them. The question for the jury is whether the comment is in their opinion beyond that which a fair man, however extreme might be his views in the matter, might make honestly and without malice, and which was not without foundation. The defense of fair comment extends to the imputation of motives. Cockburn, C. J. in *Wason v. Walter*, (1868) L. R. 4 Q. B. 73, at p. 93, speaking of the development of the law of libel, says: "The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized."¹ Whether the criticism be upon a literary production or the conduct of a public man, it is for the jury, I think, to find whether the imputation based upon facts truly stated, does or does not, honestly represent the opinion of the person who gives expression to it and was not without foundation.²

BURT v. ADVERTISER NEWSPAPER CO.

Supreme Judicial Court of Massachusetts, 1891. 154 Mass. Rep. 238.

HOLMES, J. The first question which we shall consider is raised by the presiding judge's refusal to rule that the articles were privileged. The requests referred to each article as a whole. Each article contained direct and indirect allegations of fact touching the plaintiff, and highly detrimental to him, charging him with being a party to alleged frauds in the New York custom-house. Some or all of these allegations we must take to be false. In our opinion the rulings asked were properly refused.

We agree with the defendant, that the subject was of public interest, and that in connection with the administration of the custom-

¹ In *R. v. Cobbett*, 29 How. St. Tr. 1 (1804), Lord Ellenborough charged the jury, p. 49, that, "If a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy," it was a criminal libel.

² Accord: *Dunneback v. Tribune Co.*, 108 Mich. 75 (1895), inference, from fact that the treasurer's sureties objected to plaintiff's appointment as deputy, that they did not wish to be responsible for public funds if the plaintiff had any share in handling them, held justifiable, see Hooker J. dissenting; *Howarth v. Barlow*, 113 App. Div. (N. Y.) 510 (1906), accusations against a clerk of a village board of intent to defraud; and see *Neeb v. Hope*, 111 Pa. St. 145 (1885), p. 153.

house the defendant would have a right to make fair comments on the conduct of private persons affecting that administration in the way alleged. But there is an important distinction to be noticed between the so-called privilege of fair criticism upon matters of public interest, and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant. In the latter case a bona fide statement not in excess of the occasion is privileged, although it turns out to be false. In the former, what is privileged, if that is the proper term, is criticism, not statement, and however it might be if a person merely quoted or referred to a statement as made by others, and gave it no new sanction,¹ if he takes upon himself in his own person to allege facts otherwise libelous, he will not be privileged if those facts are not true. The reason for the distinction lies in the different nature and degree of the exigency and of the damage in the two cases. In these, as in many other instances, the law has to draw a line between conflicting interests, both intrinsically meritorious. When private inquiries are made about a private person, a servant, for example, it is often impossible to answer them properly without stating facts, and those who settled the law thought it more important to preserve a reasonable freedom in giving necessary information than to insure people against occasional unintended injustice, confined as it generally is to one or two persons. But what the interests of private citizens in public matters requires is freedom of discussion rather than of statement. Moreover, the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case. If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better, certainly, when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer. *Sheckell v. Jackson*, 10 Cush. 25, 26.²

¹In *Mangena v. Wright*, 100 L. T. 960 (1909), Phillimore, J., held that such comment is protected. Fair comment on the statements, though in fact untrue, in a public document or in the accurate report of judicial or legislative proceedings, the publication or reporting of which is itself, by statute or by common law, privileged, whether published by the defendant himself or another, are protected, *Mangena v. Wright*, *supra*, *aliter* where they are contained in the report of proceedings of a vestry, the publication of which is not privileged, *Popham v. Pickburn*, 7 H. & N. 891 (1862). But the comment must be fair, see *Metcalf v. Times Publishing Co.*, *ante*.

²Accord: *Joynt v. Cycle Trade Publishing Co.*, L. R. 1904, 2 K. B. 292; *Davis v. Shepstone*, L. R. 11 A. C. 187 (1886); *Digby v. Financial News*, L. R. 1907, 1 K. B. 502; *Walker v. Hodgson*, L. R. 1909, 1 K. B. 239; *Hunt v. Star Newspaper*, *post*; *Hubbard v. Allyn*, 200 Mass. 166 (1908); *Hay v. Reid*, 85 Mich. 296 (1891); *Martin v. Payne*, 69 Minn. 482 (1897); *Farley v. McBride*, 74 Nebr. 49 (1905); *Fry v. Bennett*, 5 Sandf. 54 (N. Y. 1851); and see *Barr v. Moore*, 87 Pa. St. 385 (1878), and *Neeb v. Hope*, 111 Pa. St. 145 (1885). Nor is comment fair which is based on non-existent facts, whether asserted by the defendant or assumed by him to be true, *Digby v. Financial News*, *Hubbard v. Allyn*, *Lefroy v. Burnside*, *Fry v. Bennett*, 5 Sandf. 54 (N. Y. 1851), and compare cases cited in Note 2 to *Carr v. Hood*.

"To say that you may first libel a man and then comment upon him is

EIKHOFF v. GILBERT.

Supreme Court of Michigan, 1900. 124 Michigan, 353.

HOOKER, J. The defendants are members of an organization called the "Good Government League," in the city of Detroit, which professes to have for its object the election of worthy men to office, and the promotion of good order and honest administration of city affairs. The plaintiff, having attended one session of the legislature in the capacity of representative, was a candidate for re-election. This action was for libel, alleged to have consisted of three publications over the names of the defendants. One, for convenience called the "White Circular," was addressed to the voters, and contained in parallel columns the names of several candidates whom the electors were advised to vote for or against. The portion applicable to the plaintiff was as follows:

VOTE

FOR

Harry C. Barter for Representative, because he represents all that is good in his opponent, and does not represent the objectionable. He is the champion of labor and arbitration.

AGAINST

Henry Eikhoff for Representative, because in the last legislature he championed measures opposed to the moral interests of the community.

The question before us is whether the case should have been submitted to the jury upon one or both counts. The first charge is, in substance, that the plaintiff, in his official capacity of representative, championed measures opposed to the moral interests of the community. The undisputed testimony shows that as representative he introduced, and, to some extent, at least, approved and supported, measures calculated to change the liquor laws of the state by permitting sales on legal holidays, and election days after the close of the polls, and by repealing the act prohibiting screens in saloons. The court charged the jury that:

The language of the white circular, unexplained, unequivocally charged the plaintiff with having championed legislation opposed to the moral interests of the community. This charge is an attack

obviously absurd," Cockburn, C. J., *Queen v. Carden*, L. R. 1879, 5 Q. B. D. 1, p. 8. "If the defendant makes a misstatement of any of the facts upon which he comments, it at once negatives the possibility of his comment being fair. It is therefore a necessary part of the plea of fair comment to show that there has been no misstatement of facts in the statement of the materials on which the comment was based," Collins, M. R. in *Digby v. Financial News*, L. R. 1907, 1 K. B. 502. So Duer, J. says in *Fry v. Bennett*, 5 Sandf. 54 (N. Y. 1851), "the truth of the facts upon which" (the critical animadversions) "were founded, must be established or admitted . . . the defenses of truth and privilege are inseparably connected;" see also, Palles, C. B. in *Lefroy v. Burnside*, *supra*. As to the distinction between a plea of justification and a plea of fair comment, see Collins, M. R. in *Digby v. Financial News*, L. R. 1907, 1 K. B. 502.

upon his moral character, and would be likely to bring him into public contempt and disgrace. It is, therefore, libelous *per se*. The defense made was: *First*, that the statement was true; and, *second*, that, if it cannot be said to be true, the proven acts were subject to criticism, and the defendants had the right to express their opinion as to their effect—in other words, that the language was privileged.

The defendants had a right to discuss the fitness of the plaintiff for the office to which he aspired, and might lawfully communicate to the electors any facts within their knowledge concerning his character or conduct, and express their opinions upon them, and their inferences deduced from them, so long as they stated as facts only the truth, and as opinions and inferences therefrom only honest belief. The fault here, if there be one, is that opinions and inferences were not stated as such, but as facts. The defendants sought to justify the statement made, viz., that the plaintiff championed measures opposed to the moral interests of the community, by proving that he supported the two measures stated. To the minds of some, that would be sufficient to establish the truth of the charge. Others would think otherwise. It is manifest, therefore, that we cannot say, as a legal proposition, that the undisputed testimony establishes the truth of the broad charge. Evidently the learned circuit judge took this view. It is evident that the acts proved were sufficient to induce in the minds of some the opinion that the plaintiff had supported measures opposed to the moral interests of the community. The judge therefore instructed the jury that such persons were privileged to say so, and directed a verdict for defendants. But, admitting that they were privileged to express their opinions concerning certain acts, was this what was done? Did they not go further, and do more? They did not state what measures were supported, and their opinions of that particular conduct, but said generally and unqualifiedly, as a fact, that the plaintiff had arrayed himself against the moral interests of the community, which, if true, should discredit him with any voter who should believe the statement. It appealed alike to all classes—those who should look upon the legislation proven as not opposed to the moral interests of the community as well as those holding contrary views; and it afforded no one an opportunity to judge whether the statement was a proper deduction from the fact upon which it was based or not. If one states that a candidate is a thief, without qualification, he communicates a fact pertaining to his fitness; but it is a slander if untrue, whether it was made in good faith or not, although, had he stated the exact facts, and expressed the opinion that they amounted to stealing, though they did not technically constitute the offense of larceny, the communication might be privileged.¹

¹ See also, *Littlejohn v. Greeley*, 13 Abb. Pr. 41 (N. Y. 1861), statement that the plaintiff "was prominent in the corrupt legislation of last winter," see also, *Crows Nest Pass Coal Co. v. Bell*, 4 Ont. L. R. 660 (1902), and *Champagne v. Beauchamp*, 31 Lower Can. J. 144 (1886).

A characterization of another's conduct as dishonorable, the facts known to the defendant being only partially stated, was held in *Christie v. Robert-*

FIELD, J., in O'BRIEN v. MARQUIS OF SALISBURY.

54 *Justice of the Peace*, 215 (1890), p. 216.

"Comment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed, and from which his conclusion may be reasonably inferred. If a statement in words of a fact stands by itself naked, without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words are addressed, there would be little, if any, room for the inference that it was understood otherwise than as a bare statement of fact, and then, if untrue, there would be no answer to the action; but if, although stated as a fact, it is proceeded or accompanied by such other facts, and it can be reasonably based upon them,¹ the words may be reasonably regarded as comment, and comment only, and, if honest and fair, excusable; and whether it is to be regarded as fact or comment it is a question for the jury, to be determined by them upon all the circumstances of the case."

son, 10 N. S. W. L. R. 157 (1889), to be "misdescription. Real comment is merely the expression of opinion. Misdescription is matter of fact. To state accurately what a man has done, and then to say that in your opinion such conduct is dishonorable or disgraceful, is comment which may do no harm, as every one can judge for himself whether the opinion expressed is well-founded or not. Misdescription of conduct, on the other hand, leaves the reader no opportunity for judging for himself of the character of the conduct of the condemned, nothing but a false picture being presented for judgment;" Windeyer, J., p. 161. Where the facts are stated fully and accurately "the writer may, by his opinion, libel himself rather than the subject of his remarks;" Wilde, B., *Popham v. Pickburn*, 7 H. & N. 891 (1862); Grant, J., *Belknap v. Ball*, 83 Mich. 583 (1890), p. 589.

Any general characterization of the plaintiff's conduct or qualification for office, without giving any grounds therefor, is a statement of fact and not fair comment, *Broadbent v. Small*, 2 Vict. L. R. 121 (1876); see *Archer v. Ritchie & Co.*, 18 Rettie 719 (Sc. Ct. of Sess. 1891), p. 727. Many of the cases which hold that the motives of a public officer can not be attacked are cases of this sort; see cases cited in *Clifton v. Lange*, *post*, Note 1.

¹ See *Cooper v. Lawson*, 8 A. & E. 746 (1838), in which, after stating that the plaintiff had become surety for an election petition and that he was in circumstances making him unfit to become a surety, the defendant asked why this "cockney tailor" took all this trouble and risk of exposure in a matter with which he had nothing to do, and said the only answer was that he was "hired for the occasion." This was held not to be a "mere shadow of previous imputation" but to infer a new fact.

In many of the cases in which it is held that the motives of a candidate or public man may not be attacked and that criminal misconduct may not be imputed to him are cases of this sort, where the plaintiff's conduct is explained by the assertion of an act done by him or another or both, *Bee Publishing Co. v. Shields*, 68 Nebr. 750 (1903), conduct of a district attorney ascribed to his having been bribed; *Hamilton v. Eno*, 81 N. Y. 116 (1880), allegation that an official writing a report on street paving was employed by one of the paving companies interested.

See also, *Commercial Publishing Co. v. Smith*, 149 Fed. 704 (C. C. A. 6th Circ. 1907), where the plaintiff's guilt was assumed from the mere fact

SECTION 5.

'Abuse of Conditional Immunity.

(a) Excessive publication.

TOOGOOD v. SPYRING.

Court of Exchequer, 1834. 1 Crompton, Meeson & Roscoes, 181.

PARKE, B. In this case, which was argued before my Brothers *Bolland, Alderson, Gurney* and myself, a motion was made for a non-suit, or a new trial, on the ground of misdirection. It was an action of slander, for words alleged to be spoken of the plaintiff as a journeyman carpenter, on three different occasions. It appeared that the defendant, who was a tenant of the Earl of Devon, required some work to be done on the premises occupied by him under the Earl, and the plaintiff, who was generally employed, by Brinsdon, the Earl's agent, as a journeyman, was sent by him to do the work. He did it, but in a negligent manner; and, during the progress of the work, got drunk; and some circumstances occurred which induced the plaintiff to believe that he had broken open the cellar door, and so obtained access to his cyder. The defendant a day or two afterwards met the plaintiff in the presence of a person named Taylor, and charged him with having broken open his cellar door with a chisel, and also with having got drunk. The plaintiff denied the charges. The defendant said he would have it cleared up, and went to look for Brinsdon; he afterwards returned and spoke to Taylor, in the absence of the plaintiff; and, in answer to a question of Taylor's, said he was confident that the plaintiff had broken open the door. On the same day the defendant saw Brinsdon, and complained to him that the plaintiff had been negligent in his work, had got drunk, and he thought he had broken open the door, and requested him to go with him in order to examine it. Upon the trial it was objected, that these were what are usually termed "privileged communications." The learned Judge thought that the statement to Brinsdon might be so, but not the charge made in the presence of Taylor; and in respect of that charge, and what was afterwards said to Taylor, both of which statements formed the subject of the action, the plaintiff had a verdict. We agree in his opinion, that the communication to Brinsdon was protected, and that the statement, upon the second meeting, to Taylor, in the plaintiff's absence, was not; but we think, upon consideration, that the statement made to the plaintiff, though in the presence of Taylor, falls within the class of the communications ordinarily called privileged; that is, cases where the occasion of the publication affords a defense in the absence of express malice. In general, an action lies for the malicious publication of statements which are false in fact, and injurious

of his arrest for murder; and *Haynes v. Clinton Printing Co.*, 169 Mass. 512 (1897), where his guilt was insinuated, the facts recited being obviously insufficient grounds for such insinuation.

to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice is, that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed (*Child v. Affleck*, 4 Man. & Ryl. 590; 9 B. & C. 403)), the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion on which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master *bona fide* to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of necessity take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bona fide* in making the charge, or been influenced by malicious motives. In the present case, the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment; and we think that the fact, that the imputation was made in Taylor's presence, does not, *of itself*, render the communication unwarranted and

official, but at most is a circumstance to be left to the consideration of the jury. We agree with the learned Judge, that the statement to Taylor, in the plaintiff's absence, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false; but, inasmuch as no damages have been separately given upon this part of the charge alone, to which the fourth count is adapted, we cannot support a general verdict, if the learned Judge was wrong in his opinion as to the statement to the plaintiff in Taylor's presence; and, as we think that at all events it should have been left to the jury whether the defendant acted maliciously or not on that occasion, there must be a new trial.

Rule absolute for a new trial.

KRUSE *v.* RABE.

Court of Errors and Appeals, 1911. 80 N. J. L. 378.

PARKER, J. This was a suit for slander. At the trial there was a verdict directed for the defendant, and this writ of error is based upon an exception to that direction. The evidence was sufficient to justify the jury in finding that the plaintiff was a real estate broker doing business in Hoboken, and was employed under a written contract by a Mrs. Vette to negotiate the sale of certain real estate belonging to her, in which contract she agreed to pay him for his services a commission of three per cent.; that the plaintiff succeeded in making a sale, and at the time the transaction was to be closed, the plaintiff and Mrs. Vette, accompanied by defendant, as her attorney, attended at the office of the attorney for the purchaser, where the title was closed and Mrs. Vette was paid by a check, and she and the plaintiff and defendant went to a neighboring bank, of which defendant was the president, to cash the check and pay plaintiff his commission; that plaintiff had procured from Mrs. Vette a sort of certificate that he had negotiated the sale and had earned his commission, and stating its amount, and that he handed this when in the bank to Mrs. Vette, who handed it to defendant, who "went inside" (probably inside the partition) for the cash to pay plaintiff, and either on coming out or before going in, looked at the paper, noticed that the amount was three per cent., and addressing plaintiff, said in a loud tone of voice and in the presence of the bank clerks close by and of several persons transacting business in the bank, "I never heard of any such outrageous commission. I know a hundred real estate people in this county and none of them charge over two and one-half per cent." That plaintiff said, "Mr. Rabe, will you allow me to explain?" and he said, "No, it is simply this, you have taken advantage of this woman." There was no allegation of special damage in the declaration. Besides a plea of general issue, there were pleas of justification and privilege.

The court directed a verdict for defendant¹ without stating what grounds such direction was based on.

¹ The motion for a direction of a verdict for defendant was based upon the grounds—*first*, that the words were not slanderous *per se*; *secondly*, that this was a case of a lawyer attempting to protect his client, and that whatever

We think this action of the trial court was erroneous.

It is claimed for the defendant that the occasion was privileged.

There can be no doubt that if Mrs. Vette had asked Mr. Rabe, as her attorney, in his office, what he thought of the amount of plaintiff's charge, and he had expressed himself to her in response to that inquiry, to the same effect as he expressed himself to the plaintiff, with an honest belief in the truth of what he was saying, his language would then have been privileged. *King v. Patterson*, 20 Vroom 417, 438; *Fahr v. Hayes*, 21 Id. 275, 278. But this is not what happened. The evidence seems to be somewhat in conflict as to whether Mrs. Vette made any inquiry of Mr. Rabe about the rate or amount of the commission; but assuming that she did, and that Rabe believed what he was saying, the question still remains whether in view of the circumstances under which, and the manner in which plaintiff claims he said it, the jury would not have been entitled to find the presence of express malice. Defendant's counsel point to *Fahr v. Hayes*, *supra*, as authority to the contrary; and that decision, though in the Supreme Court and not binding on us, is entitled to great weight. It goes very far in the protection of such communications as privileged and in the negation of express malice, but it is not dispositive of this case. In *Fahr v. Hayes* the plaintiff was asking for credit and gave Hayes as a reference, this, in the opinion of the Supreme Court, justifying a confrontation of plaintiff by defendant for the purpose of convincing the prospective creditor of the danger of trusting the plaintiff. In the case at bar, the plaintiff did not refer Mrs. Vette to Rabe, and had no part in her consulting him. It was true that she was entitled to consult him and he was entitled to advise her with entire freedom so long as he did so honestly. But it cannot be said that a lawyer may shout to his client in a public place, advice that a party with whom the client has been dealing has taken advantage of him, and claim immunity under the plea of privilege. The rule is thus stated in *Odgers*, Lib. & S. 245; 335:

"If the words be spoken in the presence of strangers wholly uninterested in the matter, the communication loses all privilege. The defendant in these cases must be careful that his words reach only those who are concerned to hear them.² Words of admonition or confidential advice should be given privately, not shouted across

he said was in the course of a conversation addressed to the client in which the plaintiff took part; and *third*, that if the words were slanderous, they were justified.

²In *Dale v. Harris*, 109 Mass. 193 (1872), an instruction that the defendant accusing the plaintiff of stealing his property was protected if no other persons other than themselves and a police officer to whom the charge was made were present or had taken reasonable care that no such person should be within hearing, was sufficiently favorable to the defendant; see *Morton v. Knipe*, 128 App. Div. 94 (N. Y. 1908), to the effect that a privileged "occasion does not protect one who has made the communication on the occasion knowingly or carelessly in the hearing of those who are not concerned"; but see

the street,³ or written on postcards,⁴ or published in the newspapers.⁵ (Citing cases.) It is true that the incidental presence of some third person will not alone take the case out of the privilege, if it was unavoidable or happened in the usual course of business affairs.⁶ But if the defendant purposely contrives that a stranger should be present, and who, in natural course of things, would not be present, all privilege is lost.⁷ (Cases.) And whenever a defendant deliberately adopts a method of communication which gives unnecessary publicity to statements defamatory of plaintiff, the jury will be apt to infer malice.⁸

It is this last particular in which the case at bar is distinguishable from *Fahr v. Hayes*. The publicity of the words in that case was fairly attributable to the plaintiff's own act, and was considered by the court to be justified in consequence, and that malice was not inferable therefrom.⁹ In the case at bar, as already noted, the defendant, if plaintiff's evidence is believed, took occasion to impugn his business integrity by addressing him and not defendant's client, in a semi-public place, in a loud voice, and without any invitation on his part. We think this brings the case within the last clause of the text just quoted, and that the question of express malice should have been left to the jury. The judgment is accordingly reversed to the end that a *venire de novo* issue.⁹

Webber v. Vincent, 9 N. Y. S. 101 (1890), where the duty to communicate the statement only to those interested is stated as absolute.

³ *Accord: Oddy v. Lord George Paulet*, 4 F. & F. 1009 (1865), defendant, a customer at the plaintiff's shop, stood in the street outside the shop and loudly took him to task for his alleged dishonesty. So posting libellous placards or having a defamatory notice cried by a town crier is held to be excessive publication and as such evidence of malice, *Cheese v. Scales*, 10 M. & W. 488 (1842); *Woodard v. Dowsing*, 2 Man. & Ry. 74 (1828).

⁴ See Note 3 to *Edmondson v. Birch & Co. Ltd.*, *post*, p. 1149.

⁵ See *Coleman v. MacLennan*, *ante*, p. 1070, and cases cited in the note thereto.

⁶ *Broughton v. McGrew*, 39 Fed. 672 (1889), presence of an attorney at a stockholders' meeting held not to destroy the shareholder's right to make statements reflecting on an employee's competency; *Pittard v. Oliver*, L. R. 1891, 1 Q. B. 474; *Gildner v. Busse*, 3 Ont. L. R. 561 (1902).

⁷ *Parsons v. Surgey*, 4 F. & F. 247 (1864); *Taylor v. Hawkins*, 16 Q. B. 308 (1851).

⁸ *Brow v. Hathaway*, 13 Allen 239 (Mass. 1866); *Billings v. Fairbanks*, 136 Mass. 177 (1883), with which compare *Dale v. Harris*, 109 Mass. 193 (1872), where the defendant made the statement of his own motion, but see *Webber v. Vincent*, 9 N. Y. S. 101 (1890), where it was held that though the defendant made the statement in answer to questions put by one interested, the privilege was lost by the presence of third persons.

⁹ Unless the circumstances clearly require the statement to be made at the particular time and place, it is a matter for the jury to say whether "the charge was made before more persons than was necessary"—*Littledale, J.* in *Padmore v. Lawrence*, 11 A. & E. 380 (1840); *Davies v. Sneed*, L. R. 5 Q. B. 608 (1870); but the fact that the defendant's wife was present was held in *Jones v. Thomas*, 34 W. R. 104 (1885). Excessive publication is said in *Denver Warehouse Co. v. Holloway*, 34 Colo. 432 (1905), not to *per se* destroy the privilege but to be evidence of malice only.

EDMONDSON v. BIRCH & CO., LTD.

Court of Appeal, 1907. L. R. 1907, 1 King's Bench, 371.

COLLINS, M. R. This is an application for judgment or a new trial in an action tried before Lawrence, J., with a jury. The action was for libel, and the defense set up was, in substance, privilege. It appears to me that, when the facts are sifted and ascertained, the case is really a very clear one. The action was originally based upon the words of the telegram mentioned in the statement of claim, but subsequently the statement of claim was amended by adding a claim in respect of a letter written by the defendants. The letter, however, related to the same subject-matter as the telegram, and the same law appears to me to be applicable to both documents. The circumstances under which they were published were as follows: The defendants were a company in London, having business relations with a company in Japan, which acted as their agents and correspondents in that country. The plaintiff had been temporarily engaged by the company in Japan as their manager on trial, and the arrangement between the plaintiff and that company is stated in the statement of claim as follows: "On March 19, 1904, the plaintiff was by verbal agreement engaged by Messrs. Birch, Kirby & Co., Limited, of Kobe, Japan, on trial as their mineral manager and adviser at a monthly salary of 150 yen (£15 English money). At the same time it was further verbally arranged that Messrs. Birch, Kirby & Co., Limited, should immediately communicate with the defendant company in London to ascertain if they approved the engagement, and, subject to such approval, they agreed that if, after three months' trial, they were satisfied with the conduct and ability of the plaintiff, they would continue him in their permanent employ at an increased salary to be subsequently agreed upon, in addition to which the plaintiff was to have a share of profits arising from the mineral department of their business." In consequence of this arrangement the letter of May 7, which was one of the libels complained of, was written by the defendant company to the company in Japan. The letter, a copy of which was entered in the defendant company's letter-book, was in these terms. (The Master of the Rolls then read the letter.) This letter was followed by a telegram, sent to Japan in the terms of a code, which, when decoded, reads thus: "Have no dealings with Edmondson; give notice of dismissal." This telegram, with the translation of it, was copied into the defendant company's cable-book, and constituted the second libel complained of by the plaintiff. The telegram appears to have been couched in the terms in which it was, because they were nearest the code terms available for the purpose of conveying the required meaning. The learned judge held that the occasion on which the letter and telegram were published to the company in Japan was privileged, and that there was no evidence of any actual malice to take away the privilege; but, although that was so, he was of opinion, upon the authority of *Pullman v. Hill & Co.*, (1891) 1

Q. B. 524, that there had been a publication of the statements complained of which did not fall within the privilege, because it was made to persons who had no correlative interest in the matter, by way of intermediaries, namely, the clerks in the defendants' own office, who took down the communications to be sent to the company in Japan and wrote them out, and, as regards the telegram, the telegraph clerks. He therefore left the case to the jury, with the result that they gave the plaintiff a verdict for £80 damages. The defendants now apply for judgment or a new trial on the ground that the occasion was privileged, and that privilege covered the publication to which I have just alluded.

It seems to me that the learned judge took too high a view of the effect of the authority upon which he acted, namely, *Pullman v. Hill & Co.*, (1891) 1 Q. B. 524. That decision related to a communication made by the defendants, a limited company, to the plaintiffs, a partnership firm, which involved a serious charge against the plaintiffs. This communication was made by a letter which was dictated by the defendants' managing director to a clerk; and the court held that, under the circumstances, it was not necessary, or in the ordinary course of business, for the director to have availed himself of the clerk for the purpose of making the communication complained of, and therefore it was not privileged. The question which we have to decide is whether that case, as subsequently explained and qualified in *Boxsius v. Goblet Frères*, (1894) 1 Q. B. 842, is an authority which concludes the present case in favor of the plaintiff. On reference to the judgment of Lord Esher, M. R., in the latter case it will be seen how he qualified and distinguished the decision in the earlier case, to which he was himself a party. He said: "In the case of *Pullman v. Hill & Co.*, (1891) 1 Q. B. 524, this court held that, if a merchant dictates to a clerk a libellous statement about a customer, which that clerk takes down and gives to another clerk in the office to copy, that is a publication to the clerks, and the occasion of such publication is not privileged. We held so on the ground that it does not fall within the ordinary business of a merchant to write such defamatory statements, and that, if he does so, it is not reasonably necessary, as he is doing a thing not in the ordinary course of his business, that he should cause the statement to be copied by a clerk in his office.¹ The question here arises in

¹ It has been held, following *Pullman v. Hill*, that a letter written by a business man or by the agent of a company in charge of his business to a plaintiff, demanding the return of property alleged to have been wrongfully withheld by him and characterizing his conduct as theft, is not a communication in the ordinary course of business and that the dictation of such letters to a stenographer is not justifiable, *Moran v. O'Regan*, 38 New Brunswick R. 189 (1907); *Puterbaugh v. Gold Medal Co.*, 7 Ont. L. R. 582 (1904), revising the decision of the Divisional Court, 5 Ont. L. R. 680 (1903). It is doubtful whether any proper distinction can be drawn between the privilege attaching to communicate matter necessary for the defense of one's own interest or the interests of one's principals and the privilege to communicate similar matter for the protection of others. In these cases, as in *Pullman v. Hill*, the letters, in addition to the statements necessary for the assertion of the de-

the case of a solicitor instructed by a client to obtain payment of a bill, and to press the person who is charged with payment of the bill to the extent of asserting that he has been trying to evade payment by at least a shabby trick, and possibly by a criminal action. The first point taken is that that is not a matter within the ordinary business of a solicitor. This is an argument which a few days ago we overruled in another case, where it was said that the business of a solicitor was to conduct actions; but the court pointed out that it was also part of the ordinary business of a solicitor to endeavor to secure the money due to his client by taking steps not necessarily arising in an action." Lord Esher then went on to deal with the very point raised in this case: "Then it is said that the solicitors cannot claim privilege as between themselves and the typewriting clerk who took down the letter and the copying clerk who copied it into the letter-book. Such an argument requires consideration; but it seems to me to come to this. It is the duty of the solicitor to write and send this letter, and it is his duty to do that in the ordinary and reasonable way. The duties of a solicitor are not to one client only, but to all his clients, and he has to take measures to perform them with due diligence, and according to the necessary and reasonable method of conducting business in a solicitor's office. If a solicitor is instructed to write defamatory matter on a privileged occasion on behalf of a client, he must do this business as he does other business in the office, in the ordinary way, and that involves his having the communication taken down or copied by a clerk in his office, and copied into the letter-book. It is necessary to keep a record of the transaction, one reason being that there may be a check on the bill of costs. Such a case seems to me to be distinguishable from that of a merchant who is writing a libel out of the course of his ordinary business, who, if he has the letter copied by a clerk, does this at his own risk."

The result of the two cases to which I have alluded, taken together, appears to me to be that, where there is a duty, whether of perfect or imperfect obligation, as between two persons, which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons, where that is reasonable and in the ordinary course of business; and if so, it will not destroy the privilege. In the case of a solicitor, his duty in conducting the business of his client may be

defendant's claim against the plaintiff, contained aspersions upon the plaintiff's motives or characterized his conduct as fraudulent or criminal.

In none of the American cases, which consider the effect of dictation to a stenographer as a publication, was the communication privileged. In *Gambrell v. Schooley*, 93 Md. 48 (1901), and *Sun Life Assurance Co. v. Bailey*, 101 Va. 443 (1903), there was no claim or proof of privilege, while in *Ferdon v. Dickens*, 161 Ala. 181 (1909), the court held that the communication of the letter to the person addressed was not privileged. And see *Owen v. Ogilvie Co.*, 32 N. Y. 465 (1898), where it was held that the manager who dictated the letter addressed to the plaintiff and the stenographer who took it down were both agents of the employer in writing it, there was no publication to any third party.

absolute, whereas in this case it may be said that the duty was only one of imperfect obligation, but the nature of the obligation which gives rise to the privilege cannot, I think, alter its effect in this respect. If the duty is such as to give rise to a privileged occasion, then the fact that it is only one of imperfect obligation cannot effect the mode in which the privilege may reasonably be exercised. In the case of *Boxsius v. Goblet Frères*, (1894) 1 Q. B. 842, Davey, L. J. said that the decision at which the court was arriving was justified by the earlier authorities. I think the only one of those earlier authorities to which I need refer is the case of *Lawless v. Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262. In that case the directors of a company had caused a report, which was to be made to a meeting of shareholders, and which contained matter defamatory of the plaintiff, to be printed for circulation among all the shareholders, and the question arose whether the communication of that matter to the printer was privileged; and it was held that it was, because the printing of the report was the ordinary and reasonable mode of doing what the occasion entitled the company to do, namely, communicate the report to the shareholders. That seems to involve the decision of the very point raised in the present case, namely, that the use of the ordinary and reasonable means of giving effect to the privilege does not destroy it. In the present case there was, in addition to the ordinary business relation between the defendants and the company in Japan, a special relation created by arrangement made by the plaintiff himself with the latter company to the effect that his engagement by them was to be subject to the approval of the defendant company. There was, therefore, an obligation imposed on the defendants in the matter at the instance of the plaintiff himself, which involved communications on the subject from the defendant company to the company in Japan, which communications might necessarily have to be made by telegraph, inasmuch as, under the circumstances, it was obviously essential that the approval or disapproval of the engagement by the defendants should be communicated as promptly as possible. The only witness with regard to the mode in which the communications with the company in Japan were carried out was the defendant Horner himself. He gave evidence to the effect that the communication by telegram was carried out in the only way available, and, so far as the evidence is concerned, it was all one way, namely, to the effect that, as a matter of business, the course followed in making the communications which had been made was the reasonable and usual course to adopt under the circumstances.

With regard to the cross application, the argument for the plaintiff seemed to be really founded on the fallacy that, because the matter contained in a document complained of is defamatory, that is in itself evidence of actual malice. It is of course assumed for the purpose of the defence of privilege that the document is to some extent defamatory. I agree that the language used may in some cases be so defamatory, and so far in excess of the occasion, as to be evidence of actual malice, and to shew that the publication of the defamatory matter was not a use, but an abuse of the privileged occasion. But

the mere fact that language used is somewhat strong, or not altogether intemperate, would not, in the absence of any indication that it was not used bona fide, be evidence of malice.² On looking at the whole of the circumstances and the correspondence in this case, I can see no shadow of a reason for the suggestion that the privilege was in the present case abused. For these reasons I think that the application of the defendants to enter judgment must be allowed, and the cross application disallowed.

COZENS-HARDY L. J. I am of the same opinion, and I only wish to add this. I think that, if we were to accede to the argument for the plaintiff, we should in effect be destroying the defence of privilege in cases of this kind, in which limited companies and large mercantile firms are concerned; for it would be idle in such cases to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only. In the ordinary course of business such a document must be copied and finds its way into the copy letter-book or telegram-book of the company or firm. The authorities appear to me to show that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business.

FLETCHER MOULTON L. J. I agree. In my opinion the law on the subject, as laid down in the cases, amounts to this: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.³

Judgments for defendants.

² *Accord: Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495 (1872). "To submit the language of privileged communications to a strict scrutiny and to hold all excess beyond the actual exigency of the occasion to be evidence of malice, would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications"—per Sir Robert Collier, p. 508; *Spill v. Maule*, L. R. 4 Exch. 232 (1869); *Sutton v. Plumridge*, 16 L. T. 741 (1867), plaintiff stated to have been "as drunk as a sow"; *Gattis v. Kilgo*, 128 N. Car. 402 (1901); *Strode v. Clement*, 90 Va. 553 (1894), p. 559.

But the language of the communication may be so much in excess of the occasion, so disproportionate to the facts or so much too violent, or may so needlessly ascribe improper motives that it may be evidence of malice, *Fryer v. Kinnersley*, 15 C. B. (N. S.) 422 (1863); *Gilpin v. Fowler*, 9 Exch. 615 (1854); *Wright v. Woodgate*, 2 Crompt. M. & R. 573 (1835); *Nichols v. Eaton*, 110 Iowa 509 (1900); *Gassett v. Gilbert*, 6 Gray 94 (Mass. 1859); *Atwill v. Mackintosh*, 120 Mass. 177 (1876); *Wagner v. Scott*, 164 Mo. 289 (1907); *Jackson v. Pittsburgh Times*, 152 Pa. St. 406 (1893), exaggerated and sensational newspaper article; *Mulderig v. Wilkes-Barre Times*, 215 Pa. 470 (1906); *Farley v. Thalhimer*, 103 Va. 504 (1905). So it is held in *Smith v. Smith*, 73 Mich. 499 (1888), that the inclusion of defamatory statements as to facts unnecessary for the protection of the maker's interests is evidence of malice, a letter notifying tradesmen not to give credit to a wife being part from her husband, unnecessarily made defamatory statements as to the causes which had led to their separation.

³ *Accord: Ashcroft v. Hammond*, 197 N. Y. 488 (1910), *semble*, at least when the plaintiff has shown his consent to a telegraphic correspondence by himself using that means of communication; compare *Williamson v. Freer*,

HEBDITCH v. MCILWAINE.

Court of Appeal, 1894. 1894 Law Reports, 2 Queen's Bench Div. 54.

LORD ESHER, M. R. In this case the plaintiff has brought an action against the defendants for writing and publishing a libel upon him, the defamatory matter complained of being that he had, when a candidate for the office of guardian of the poor, been guilty of treating. It must be borne in mind that the material part of the cause of action in libel is not the writing, but the publication of the libel. It was proved that the defendants had written and published to the board of guardians matter which the jury found to be libellous with regard to the plaintiff, and which was untrue. The defendants set up by way of defence that the occasion was privileged. It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burden of shewing actual malice is cast upon the plaintiff, but, unless the defendant does so, the plaintiff is not called upon to prove actual malice. The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but, when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion.

What are the facts upon which the question, whether the occasion was privileged, depends in the present case? There had been an election to the office of guardian of the poor, and the plaintiff had been elected. The defendants were ratepayers, who had a right to vote at the election. After the election they wrote and sent the letter containing the matter complained of to the board of guardians. It seems clear that, when that board had received the letter, they could do nothing in the matter. They could not set aside the

L. R. 9 C. P. 393 (1874), where after a verdict for the plaintiff, based on the jury's finding that it was not reasonable to send the statements in question by telegram, the court refused to enter a verdict for the defendant. In that case the defendant, who had accused the plaintiff of theft, telegraphed from Leicester to the latter's father in London "Your child will be given in charge of the police unless you reply and come to-day, she has taken money out of the till." In *Tobin v. City Bank*, 1 S. C. R. (N. S.) 267 (N. S. W. 1878), it was held excessive publication for a Sydney Bank, in order to save expense, to send a defamatory telegram through their Melbourne agents instead of directly by the Government Telegraph Office at Sydney.

The sending of privileged defamatory matter by post card is not a reasonable manner of communication, *Robinson v. Jones*, Ir. 4 C. L. 391 (1879). "The question, then, is whether a person having occasion to communicate to another defamatory matter is entitled, for the mere purpose of saving one half-penny postage, to make that communication, not by a closed letter, capable of being used by the person through whose hands it is transmitted to the post, by the official post office, and by the servants of the house at which it is delivered;"—Pallas, C. B., p. 396; *Sadgrove v. Hole*, L. R. 1901, 2 K. B. 1, *semble*, though, the statement on the post card being unintelligible to any one but the addressee, it was held that there was no excessive publication. *Contra: Steele v. Edwards*, 15 Ohio C. C. 52 (1897), holding that it cannot be assumed that third persons, especially post-office officials, had wrongfully read post cards not addressed to them.

election. Such being the facts of the case, what was the judge called upon to consider in dealing with the question whether the occasion was privileged? He had first to consider whether the defendants, who published the defamatory matter, had any interest or duty in connection with the subject which they thus brought before the board of guardians. I am not prepared to say that they had not an interest or duty. On the contrary, I am inclined to think that they had an interest in the matter. They were electors, and had an interest in having the office filled by a person properly elected. Then the position of the board of guardians, to whom the defamatory matter was published, had to be considered. They had no interest in the matter, as it seems to me, and, as I have already said, they had no duty or power to take any action upon the communication made to them. Under these circumstances I think it is clear that the occasion was not privileged.

It was argued that, although the board of guardians had no power or duty or interest in the matter, nevertheless the occasion was privileged, because the defendants honestly and reasonably believed that the board had such a duty or power or interest, and were asking them for redress in the matter, which they believed they could give. Assuming that the defendants had such a belief, though I confess I cannot see how there could be any reason in such a belief, the argument in substance seems to come to this: that the belief of the defendants that the occasion was privileged makes it privileged. I cannot accept the proposition so put forward. I cannot see how the belief of the defendants, who have made a mistake, and have published a libel to persons who have no interest or duty or power in the matter, can affect the question. The belief of the defendants might have a bearing on the question of malice; if it be assumed that the occasion was privileged, the belief of the defendants might be strong to shew that the communication was privileged, as being made without malice, but I do not think it has anything to do with the question whether the occasion was privileged. Reliance was placed rather on authority than on principle in support of the contention for the defendants. If that contention had been decided to be correct by the Court of Appeal or any Court whose authority was binding on us, there would, of course, be no more to be said. But I do not think that the point has been decided in favor of the defendants by any such Court.

The only case which really seems to me to be a strong authority in favor of the defendant's contention is the case of *Tompson v. Dashwood*, 11 Q. B. D. 43. There the judges distinguish between the writing and the publication of the libel, and speak of the writing as having been on a privileged occasion. I cannot follow their reasoning. The cause of action in libel is, as I said at the beginning of my judgment, not the writing but the publication of the libel; and the question is not whether the writing, but whether the publication is on a privileged occasion. The only way to deal with that case in my opinion is to say that we do not agree with it, and that it was wrongly decided. Therefore, in the present case, when it was proved to the judge that the libel was published by the defendants

to the board of guardians, who had no interest in the matter nor any duty or power to deal with it, then, without more, he ought to have held that the occasion was not privileged, and there was no further question to try as to privilege.

DAVEY, L. J. I am of the same opinion. I do not think it necessary to state the reasons for my opinion at length. I desire, however, to say that I agree with the Master of the Rolls in thinking that the judgment in *Tompson v. Dashwood*, 11 Q. B. D. 43, cannot be supported. It is not the writing of a libel which is actionable, but the publication of it. The question, whether the occasion on which such publication takes place is privileged, depends, in my opinion, on the question whether there is in fact an interest or duty in the person to whom the libel is published: I cannot think that the mistake of the defendant in addressing the communication to the wrong person, or his belief, however honest, that the person to whom it is published has a duty or interest in the matter, can make any difference with regard to the question whether the occasion is privileged.

COLEMAN v. MACLENNAN.

Supreme Court of Kansas, 1908. 78 Kans. 711.

BURCH, J. The plaintiff argues that the defense of privilege was destroyed by the fact that the copies of the defendant's newspaper circulated in other states, complains of the instructions given upon the subject, and insists that the instruction offered by him should have been given. The instruction given was correct and follows the rule announced by this court in *Redgate v. Roush*, 61 Kans. 480. There a matter of interest to communicants of a church was published in the church papers in Indiana, Ohio, Texas and Nebraska. It was inevitable that they should be read by people of other denominations. The syllabus reads: "Where the publication appears to have been made in good faith and for the members of the denomination alone, the fact that it incidentally may have been brought to the attention of others than members of the church will not take away its privileged character."¹ This accords with the general rule stated in 25 Cyc. Law & Proc. p. 387. See also *Hatch v. Lane*, 105 Mass. 394; *Menters v. Bee Publishing Co.*, 5 Nebr. (Unof.) 592. In the cases of *State v. Haskins*, 109 Ia. 656, *Buckstaff v. Hicks*, 94 Wis. 34, and *Sheftall v. Central R. Co.*, 123 Ga. 589, language is used from which it might be inferred that the privilege will be destroyed if the communication should reach the eyes of others than persons interested.² This would be the end of privi-

¹ Accord: *Shurtleff v. Stevens*, 51 Vt. 501 (1879), similar facts.

² See accord: *Jones, Varnum & Co. v. Townsend*, 21 Fla. 431 (1885), *semble*, and see *Duncombe v. Daniel*, 8 C. & P. 222 (1837), 1 W. W. & H. 101; the procurement of the publication in the public newspapers of an attack on a candidate for Parliament held not privileged, though it is doubtful whether the decision went on the ground of excessive publication to those not concerned as electors or on the ground that the statements attacked the candidate's private rather than his public character; and *Pierce v. Ellis*, 6 Ir. C.

lege for all newspapers having circulation and influence. Generally the publication must be no wider than will meet the requirements of the moral or social duty to publish. If it be designedly or unnecessarily or negligently excessive, privilege is lost. But, if a state newspaper published primarily for a state constituency have a small circulation elsewhere, it is not deprived of its privilege in the discussion of matters of state-wide concern because of that fact.³

(b) "Malice."

Parson Prick's Case, cited in Cro. Jac. 91.

Coke cited a case, where Parson Prick in a sermon recited a story out of Fox's Martyrology, that one Greenwood, being a perjured person, and a great

L. 55 (1856), where the defendant handed to newspaper reporters a copy of his speech made at a public meeting called to petition Parliament, and compare *Hunt v. Bennett*, 19 N. Y. 173 (1859), where the defendant published in a newspaper an open letter attacking the character of an applicant for appointment by a municipal council to an office in its gift.

³See *Express Printing Co. v. Copeland*, 64 Tex. 354 (1885). In *Marks v. Baker*, 28 Minn. 162 (1881), it was held that citizens had the right to publish in a local paper an article containing statements defamatory of a candidate for a local election office. The insertion in a newspaper of an advertisement of purely private concern was held by Ellenborough, C. J. in *Brown v. Croome*, 2 Starkie 297 (1817), to be justifiable only if the defendant showed that "such publication was the only effectual means of accomplishing his object" of giving information to the persons to whom it was proper for him to convey it, and it was there held that it was not necessary for the defendant to do so in order to convene a meeting of the plaintiff's creditors, of whom he was one, and it was doubted in *Lay v. Lawson*, 4 A. & E. 795 (1836), whether newspaper advertisement was ever justified to protect or further a purely private interest. The later American cases, however, hold that it is for the jury to say whether the advertisement is a reasonable or necessary method of giving notice to those interested or whom the defendant must notify to protect his interests, *Hatch v. Lane*, 105 Mass. 394 (1870), defendant inserted an advertisement warning his customers against paying bills to a discharged employee; *Holliday v. Ontario Farmers Mutual Insurance Co.*, 33 U. C. Q. B. 558 (1873), *semble*; see also *Redgate v. Roush and Shurtleff v. Stevens*, 51 Vt. 501, and the publication of such advertisements by a newspaper is also privileged, *Commonwealth v. Featherston*, 9 Phila. 594 (Pa. 1872), advertisement warning the public against negotiating notes alleged to have been fraudulently procured by the plaintiff. In *Smith v. Streatfield*, L. R. 1913, 3 K. B. 764, it is held that the malice of the author of a privileged communication destroys the privilege of a newspaper publishing it in good faith, see *Thomas v. Bradbury, Agnew & Co.*, L. R. 1906, 2 K. B. 627.

In *Sheftall v. Central R. Co.*, 123 Ga. 589 (1905), it was held that the defendant, though privileged to communicate to all employees, concerned with the validity of tickets, its suspicion that a discharged conductor had appropriated tickets which he might put in circulation, could not do so by posting placards which it knew or should have known would be also read by other employees, and see *P. W. & B. R. Co. v. Quigley*, 21 How. 202 (U. S. 1858), and as to the right of commercial agencies to circulate information as to the financial standing of business men and firms among all their subscribers, many of whom are not concerned in the particular information furnished, see *Taylor v. Church*, 8 N. Y. 452 (1853); *Sunderlin v. Bradstreet*, 46 N. Y. 188 (1871); *Commonwealth v. Stacey*, 8 Phila. 617 (Pa. 1871); *King v. Patterson*, 49 N. J. L. 417 (1887); *Bradstreet Co. v. Gill*, 72 Tex. 115 (1888); *Pollasky v. Minchener*, 81 Mich. 280 (1890); *Mitchell v. Bradstreet Co.*, 116 Mo. 226 (1893).

persecutor had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth he never was so plagued, and was himself present at that sermon; and he thereupon brought his action upon the case, for calling him a perjured person: and the defendant pleaded not guilty. And this matter being disclosed upon evidence, WRAY, Chief Justice, delivered the law to the jury, that it being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously; and so was found not guilty. 14 Hen. 6 pl. 14. 20 Hen. 6 pl. 34.—And Popham affirmed it to be good law, when he delivers matter after his occasion as matter of story, and not with an intent to slander any.—Wherefore, for these reasons, it was adjudged for the defendant.¹

BAYLEY, J. in *Bromage v. Prosser* (1825), 4 B. & C. 247: That *malice*, in some sense, is the gist of the action, and that therefore the *manner and occasion of speaking the words* is admissible in evidence to show they were not spoken *with malice*, is said to have been agreed (either by all the judges, or at least by the four who thought the truth might be given in evidence on the general), In *Smith v. Richardson*, Willes, 24; and it has been laid down in 1 Com. Dig. action upon the case for defamation, G 5, that the declaration must show a *malicious intent* in the defendant, and there are some other very useful elementary books in which it is said that malice is the gist of the action, but in what sense the words *malice* or *malicious intent* are here to be understood, whether in the *popular* sense, or in the sense the law puts upon those expressions, none of these authorities state. Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are; if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? But in actions for such slander as is *prima facie* excusable on account of the cause of speaking or writing it, as in the case of servant's characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff, and in *Edmondson v. Stevens*, Bull. N. P. 8, Lord Mansfield takes the distinction between these and ordinary cases of slander. Buller, J., repeats in *Pasley v. Freeman*, 3 T. R. 61, that for words spoken confidentially upon advice asked, no action lies, unless express malice can be proved. So in *Hargrave v. Le Breton*, 3 Burr. 2425, Lord Mansfield states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary circumstances of express malice. But in an ordinary action for libel or for words, though evidence

¹ So in *Crawford v. Middleton*, 1 Lev. 82 (1674), where the plaintiff was nonsuited on the ground that the defendant, who had said that the plaintiff had been hanged for stealing a horse, had, as it appeared on the evidence, spoken the words in genuine grief and sorrow at the news.

of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice.

BURCH, J. in *Coleman v. MacLennan*, 78 Kans. 711.¹

With all due deference to *Upton v. Hume*,² the remarks quoted read as if they had been written in the midst of the fog of fictions, inferences and presumptions which enshroud the law of libel. Facts and the truth never have been much in favor in that branch of the law. Its early use as a weapon and shield of caste and arbitrary power would have been impaired. Suppose a serious charge to be made: By a fiction it is presumed to be false. By a fiction malice is inferred from the fiction of falsity. By a fiction damages are assumed as a consequence of the fictions of malice and falsity. Publication only is not presumed, and until recent times the offer to show the truth of the charge as having some bearing upon liability was a sacrilegious insult to this beautiful and symmetrical fabric of fiction. Then a defendant was made to suffer additional smart for venturing to obtrude the truth as a defence if, although his proof were abundant, he barely failed, in the opinion of the jury, to make out a preponderance. It is, however, in the field of malice, where the rule stated in the quotation lies, that truth and fact are most superfluous. In the first place it is said that malice is the gist of the action for libel. This is pure fiction. It is not true. The plaintiff makes a complete case when he shows the publication of the matter from which damage may be inferred. The actual fact may be that no malice exists or could be proved. Frequently libels are published with the best of motives, or perhaps mistakenly or inadvertently but with an utter absence of malice. The plaintiff recovers just the same. Therefore "the gist of the action" must be taken out of the case. This is done by another fiction. It is said that of course malice does not mean the one thing known to fact or experience to which the term may apply, but it is just a legal expression to denote want of legal excuse. In this state a statutory definition of libel making malice an essential ingredient as at the common law compels this court to say that the intentional publication of libelous matter implies malice, whatever the motive may be. (*The State v. Clyne*, 53 Kans. 8, 35 Pac. 789.) So, a fiction was invented to meet an unnecessary fiction which became troublesome, and the courts go on gravely ascending the hill for the purpose of descending, meanwhile filling the books with scholastic disquisitions, verbal subtleties and refined distinctions about malice in law, malice in fact, express malice, implied malice, etc., etc.

Now, what is the fact? Instead of malice being the gist of the action it may come into a libel case and be of importance in two events only: to affect damages, and to overcome a defense of privilege. If the occasion be absolutely privileged, there can be no recovery. If it be conditionally privileged, the plaintiff must prove malice—actual evil-mindedness—or fail. When it

¹For the facts of the case and so much of the opinion as deals with the existence of a privilege to communicate to electors information as to candidates for elective office, see *ante*, p. 1070.

²In 24 Ore. 420, the remarks quoted are "The only safe evidence of a man's intentions are his acts, and if he accuses another of a crime he must conclusively be presumed to have intended to injure him."

comes to this proof there is no presumption, absolute or otherwise, attaching to a charge of crime. The proof is made from an interpretation of the writing, its malignity or intemperance, by showing recklessness in making the charge, pernicious activity in circulating or repeating it, its falsity, the situation and relations of the parties, the facts and circumstances surrounding the publication, and by other evidence appropriate to a charge of bad motives, as in other cases."

LANCASTER v. HAMBURGER.

Supreme Court of Ohio, 1904. 70 Ohio St. 156.

Error to the Superior Court of Cincinnati.

Lancaster brought suit against Hamburger, the substance of the allegations of his petition being, that he had, for a long time, been in the employ of the Cincinnati Street Railway Co. in the capacity of a conductor; that the defendant, who had conceived a violent dislike to him, and who had repeatedly threatened to procure his discharge from said employment, did, without excuse, cause, or justification, and actuated solely by a malicious desire to injure plaintiff, falsely and maliciously say to the superintendent of said company that plaintiff, while on duty as conductor, had been guilty of misconduct and of violation of the rules of the company, in consequence of which charge plaintiff was, on that day, discharged from said employment, to his damage in the sum of ten thousand dollars. The defendant, answering, denied the allegations of malice, and averred that while he and others were traveling as passengers on the car of said company which was in charge of plaintiff as conductor, the plaintiff was guilty of rude and ungentlemanly conduct toward them, which defendant reported to the superintendent of the company, and that the superintendent, after investigating the subject, discharged the plaintiff from the company's service.

The plaintiff excepted to the charge of the court, the material portion of which is the following instruction given at the request of the defendant: "It was the duty of the plaintiff not to conform to any fanciful degree of conduct, nor to observe the degree of conduct which, perhaps, we would like to observe at all times as ideal, but he was obliged to observe such degree of deportment, decorum, politeness and courtesy as is common among ordinary men in their dealings with one another; and if he failed to observe such a standard, then he would be guilty of rudeness and the defendant in the case would have a right to make complaint.

The jury returned a verdict for the defendant and, the plaintiff's motion for a new trial having been overruled, judgment followed the verdict. The judgment was affirmed by the superior court at general term.

SHAUCK, J. (After commenting upon the cases of *Allen v. Flood*, 1898, A. C., 1, and *Quinn v. Leatham*, 1901, A. C., 495.) Neither of these cases, nor any of the others cited by counsel for the plaintiff, can have the effect to disturb the rule generally recognized and well established in this state, that it is immaterial what motive

one is prompted in the exercise of a clear legal right or the performance of a duty. *Frazier v. Brown*, 12 Ohio St. 294; *Letts v. Kessler*, 54 Ohio St. 73; *Kelley v. The Ohio Oil Co.*, 57 Ohio St. 327.¹ Certainly the motive which prompts one to the commission of a wrongful act may be very material, for it may determine whether the injured party may recover exemplary, or only compensatory damages. The record does not admit a doubt that the defendant exercised a legal right, if, indeed, he did not perform a duty in making complaint to the superintendent of the company of the plaintiff's misconduct. The evidence tended to show, and the instruction required the jury to find, that the plaintiff had been guilty of the misconduct of which complaint was made. The defendant and his wife were patrons of the street railway company, a common carrier of passengers, and entitled, in common with the public generally, to civil treatment while aboard its cars, and to the benefit of the rules designed for the safety and comfort of passengers. The plaintiff was the representative of the company who came in contact with its patrons, and through who it discharged some of the most important duties it owed the public. Since it would not be practicable for the company to institute and maintain such supervision of the conduct of all its conductors as would secure the full performance of all their duties toward passengers, the patrons of the road should be encouraged to report their misconduct fairly and justly; nor should a patron of the company be required, by the consciousness of ill will toward the offender, to abstain from making a truthful report of such misconduct. Seeing that such misconduct naturally arouses resentment in all who observe it, it would result, from the contrary rule, that a conductor's immunity from complaint would be in proportion to the offensiveness of his misconduct.

Judgment affirmed.²

¹ See *Fowler v. Jenkins*, 24 Pa. 308 (1855), where the defendant removed a fence wrongfully erected by himself and the plaintiff on a public highway. So the motive which inspires a man to take such action as the law permits to protect his person or property from wrongful interference or intrusion, is immaterial. *Brothers v. Morris*, 49 Vt. 460 (1877); *Kiff v. Youmans*, 86 N. Y. 324 (1881), *semble*; *Oakes v. Wood*, 2 M. & W. 791 (1837), the defendants, occupiers of land, expelled a trespasser. "If the defendant had a justifiable cause for turning the party out, the motive was wholly immaterial; even though he did it in pursuance of an old grudge, it makes no difference, as long as he did no more than was necessary to turn her out."—*Parke B. Humphrey v. Douglass*, 11 Vt. 22 (1839), defendant turned off his farm a horse wrongfully intruding thereon; *Smith v. Johnson*, 76 Pa. St. 191 (1874), landowner removed an encroaching fence, compare *Jenkins v. Fowler*, 24 Pa. St. 308 (1855); *Clinton v. Myers*, 46 N. Y. 511 (1871), riparian owner opened gates in a dam, which obstructed the natural flow of the stream. So a landowner may, without regard to his motive, do any act necessary to prevent another acquiring an easement over it, *Mahan v. Brown*, 13 Wend. 261 (N. Y. 1835), *semble*; *Phelps v. Nowlen*, 72 N. Y. 39 (1878).

² In an action of Slander or Libel if the truth of the defamatory statements be specially pleaded and "the jury are satisfied that the words are true in substance and fact, they must find for the defendant, though they feel sure that he spoke the words spitefully and maliciously"—*Odgers, Libel and Slander*, 4th ed., 1913. As to the law of Quebec, see *Trudel v. Viau*, Montreal L. R., 5 Q. B. 502 (1889); *Jeannotte v. Gauthier*, Montreal L. R. 1897, 6 Q. B. 520.

BRADLEY v. HEATH.

Supreme Judicial Court of Massachusetts, 1831. 12 Pick. 163.

SHAW, C. J. Where words imputing misconduct to another, are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith, to those who have an interest in the communication and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained in such cases, without proof of express malice. If the occasion is used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse, *Bromage v. Prosser*, 4 Barn. & Cressw. 247; Starkie on Slander, 200.

We think the case must be governed by this rule. The charge in the first two counts was, that the plaintiff had put two votes into the ballot box. It appears that the defendant was one of the selectmen of the town, and that the words were spoken in an open town-meeting during an election, at which the defendant was acting in his capacity as a public officer. It appears to us that this falls under both branches of the rule stated. It is therefore to be deemed a privileged communication.

Such being the occasion of speaking the words, as it appeared on the proof of the plaintiff's case, any evidence which tended to prove that the defendant was acting in good faith, in the discharge of his duty, was competent to repel the charge of express malice, or colorable pretence. With this view it was competent to show that the manner of the plaintiff's voting at the time the words were uttered, was such as to excite suspicion and induce a belief, that the plaintiff put in more votes than one. It was in effect proof of probable cause, which is allowable, when the occasion of speaking the words affords *prima facie* evidence of an excuse for speaking them. *Remington v. Congdon*, 2 Pick. 310. And we think that this in no degree impugns the rule, that in ordinary actions of slander, where the occasion furnishes no *prima facie* excuse, the truth of the words spoken cannot be given in evidence under the general issue.¹

FAHR v. HAYES.

Supreme Court of New Jersey, 1888. 50 N. J. L. 275.

DIXON, J. So much being established on behalf of the defendant, it then became incumbent on the plaintiff to show that the de-

¹ So comment otherwise fair loses its immunity if shown to be inspired by actual malice, *Thomas v. Bradbury, Agnew & Co.*, L. R. 1906, 2 K. B. 627; *Tawney v. Simonson, Whitcomb & Hurley Co.*, 109 Minn. 341 (1909).

famatory words were uttered out of what is called *express malice*. If he produced any evidence from which express malice could legally be inferred, then it was proper to submit the question to the jury; if he did not, a verdict for the defendant should have been directed.

By express malice in this connection is meant some motive, actuating the defendant, different from that which *prima facie* rendered the communication privileged, and being a motive contrary to good morals.¹ The motive which in the present case the law *prima facie* imputes to the defendant, in regarding his conduct as innocent, is a desire to give Thoma (who had made inquiries of the defendant as to the credit of the plaintiff, a former customer of the defendant's) true information, in order to prevent his crediting the plaintiff, whom the defendant thought not worthy of credit, and hence the question here is whether the evidence tended to establish any other motive contrary to good morals.

The language used by the defendant fairly discloses another motive than the imputed one, not indeed inconsistent, but rather conjoined with it, viz., indignation towards the plaintiff for his supposed crime. This motive, however, is not contrary to good morals, and therefore cannot be ranked as malicious *per se*, and so long as it does not impel its possessor into an illegal act it cannot subject him to the condemnation of the law. At the time now under review it did not betray the defendant into any expression beyond what was pertinent to the subject of Thoma's inquiry, and was honestly believed by the defendant and therefore was legalized by the privileged occasion and motive.²

OVER *v.* SCHIFFLING.

Supreme Court of Indiana, 1885. 102 Ind. 191.

ELLIOT, J. The complaint of the appellee alleges that the appellant maliciously published a libel; that the libellous matter was contained in a letter written by the latter to a corporation called the Encaustic Tile Company, by whom the appellee was then employed. The letter, omitting the date, address, signature and formal part, is as follows:

"Mr. Schiffing owes me on work done on your dies, etc., \$33.

¹It is not necessary that the communication be inspired by personal ill-will or animosity toward the plaintiff, *Gattis v. Kilgo*, 128 N. Car. 402 (1901), p. 407, where it was held that the trial judge had properly refused the defendant's request for an instruction, that "malice in fact means personal ill-will and a desire to injure the plaintiff," saying "that if the publication was not in good faith for the reason claimed, but from a wrongful, indirect and ulterior motive and was false, the same was malicious"; *Blumhardt v. Rohr*, 70 Md. 328 (1889); *Hellstern v. Katzer*, 103 Wis. 391 (1899); but see *Bacon v. Mich. Cent. R. Co.*, 66 Mich. 166 (1887).

²In *Cranfill v. Hayden*, 97 Tex. 544 (1904), it is held the desire to injure the plaintiff need not be the sole or even the dominant motive. The defendant is protected only when the desire to perform his duty is his sole motive for making the communication.

If you would consent to retain such amount out of any money due him from you, let me know by return mail. If you will not consent to do so, I shall have to file a mechanic's lien on the goods. He got them of me by lying; first, he said he would bring an order from you, then he would pay cash for them before he took them away. He then watched his chances and took them when the foreman was not in, and now refuses payment."

It is also alleged that the appellee was dismissed from the service of the corporation to whom the letter was addressed, and he demanded special and general damages.

The letter was not a privileged communication. The information it professes to contain was volunteered, and the purpose for which it was conveyed to the appellee's employer was solely for the benefit of the writer, and was not intended to benefit the employer by giving him, in good faith and for a just purpose, information necessary for his protection against a knavish servant.¹

CLARK v. MOLYNEUX.

Court of Appeal, 1877. Law Reports 1877-78, 3 Q. B. Div. 237.

The action was for slander and libel.

The plaintiff, a clergyman of the Church of England, had been formerly in the army and after taking his degree at Cambridge was ordained and became curate at Assington to the Reverend H. L. Maud.

In 1876, the defendant, the Reverend Canon Molyneux, the Rector of Sudbury near Assington, in calling on a Mr. Bevan with whom he had been intimate for many years, was informed by him that the plaintiff was going to preach at Newton Church in the neighborhood and that he was sure that if Mr. Charles Smith, the rector, knew what sort of a person the plaintiff was he would never permit him to preach. Mr. Bevan asked the defendant as an old friend of Mr. Smith's to let him know what the plaintiff's char-

¹ *Accord: Hollenbeck v. Ristine*, 114 Iowa 358 (1901), similar facts; *Beals v. Thompson*, 149 Mass. 405 (1889), similar statements made to plaintiff's husband in an effort to induce him to pay a debt contracted by her before her marriage; but see *Fairman v. Ives*, 5 B. & Ald. 642 (1822), where a letter to the plaintiff's commanding officer complaining of his refusal to pay a debt to the defendant and asking such officer to enforce payment, was held privileged. So it was held that a communication by the defendant, a rival trader, of statements derogatory to the plaintiff's goods "from motives of personal gain to be secured through injury to a rival in business" was not privileged, *Brown v. Vannaman*, 85 Wis. 451 (1893); and see *Hubbard v. Rutledge*, 57 Miss. 7 (1879).

In *Hooper v. Truscott*, 2 Bing. N. C. 457 (1836), a charge of felony made to the plaintiff's relatives to induce them to pay hush money was held not to be privileged; see also, *Smith v. Hodgekins*, Cro. Car. 273 (1633), and in *Jackson v. Hopperton*, 16 C. B. (N. S.) 829 (1864), the fact that the defendant did not make his charge against the plaintiff till she threatened to leave his service, and told her that he would say nothing about it if she returned and would give her a reference if she confessed, was held sufficient evidence of malice to support a verdict for the plaintiff.

acter was. The defendant placing implicit reliance upon Mr. Bevan and thinking it was his duty to acquaint Mr. Charles Smith of the matter, went to his house and finding him ill in bed communicated his information to Mr. Smith's son, also a clergyman, who was there. The defendant afterwards consulted his rural dean as to whether he should speak to the plaintiff's rector Mr. Maud, the dean advised him to do so. As Mr. Maud was abroad the defendant spoke to his solicitor on the subject and on Mr. Maud's return he received a letter from him asking for information and wrote an answer detailing the facts as stated by Mr. Bevan. The defendant also consulted his curate who had been with him for many years and whom he invariably consulted about all church matters. The communications to the curate, to Mr. Smith's son and to the dean were the slanders complained of, and the letter to Mr. Maud was the libel complained of. The defendant relied solely upon the privilege of the occasion and *bona fides* of his statements.

The action was tried before Baron Huddleston and a special jury. The learned judge ruled that all the occasions were privileged and the case went to the jury on the question of express malice. The jury found a verdict for the plaintiff for £200 damages.

The defendant moved for a new trial in the Queen's Bench Division on the ground that the verdict was against the weight of the evidence and of the misdirection of the court complaining of the general tenor of the summing up and particularly the following passage therein:

"You, Mr. Molyneux, may defend yourself by the fact that these occasions were privileged, but to do so you must satisfy a jury that what you did you did bona fide and in the honest belief that you were making statements which were true. * * * What you have to consider is this: assuming that these occasions were privileged, do you think that the defendant made these statements and wrote this letter bona fide and in the honest belief that they were true, not merely that he believed them himself, but honestly believed them—which means that he had good ground for believing them—to be true? I mean to say that if he pertinaciously and obstinately, perhaps, persuaded himself of a matter for which persuasion he had no reasonable ground, and with respect to which persuasion you twelve gentlemen would say he was perfectly unjustified * * * then your verdict will be for the plaintiff."

The court refused the rule and the defendant appealed.

BRAMWELL, L. J. Before I proceed further in discussing the language of the summing-up, I wish to remark that a person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on the occasion it may be proper to communicate it to a particular person who ought to be informed of it. Can it be said that the person making the statement is liable to an action for slander? In the present case the judge asked the jury whether the defendant did what is complained of in the honest belief that what he wrote and said with reference to the plaintiff was true. At a later period of the summing-up the judge explains what

he means by honest belief; and the effect of his language is, that the jury must have been led to think that "honest belief" means, not the actual belief in the defendant's mind, but belief founded upon reasonable grounds. Apart, therefore, from the question upon whom the burden of proof lay, I think there was a misdirection as to the meaning of the term "honest belief," and that the verdict against the defendant cannot stand.

BRETT, L. J.¹ I am of opinion that there was a misdirection by the learned judge to the jury; that the verdict was against the weight of the evidence; and that there was no evidence of malice which ought to have been left to the jury.

With regard to the misdirection, we do not differ from the Queen's Bench Division as to the rule of law which governs this case, but we think that the direction of the learned judge was calculated to mislead the jury as to what was the right question for their decision. The direction to the jury was founded on the assumption that the occasions were privileged, and that which must be taken to be a libel would be excused if the defendant had used the privilege fairly and honestly. Before I address myself to the summing-up, I think it advisable to lay down what I consider would be a true exposition of the law in such matters. When there has been a writing or a speaking of defamatory matter, and the judge has held—and it is for him to decide the question—that although the matter is defamatory the occasion on which it is either written or spoken is privileged, it is necessary to consider how, although the occasion is privileged, yet the defendant is not permitted to take advantage of the privilege. If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. (One, but by no means the only, indirect motive which can be alleged, is the gratification of some anger or malice of his own.) If he uses the occasion to gratify his anger or malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive.² If the indirect and wrong motive suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is properly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So if it be

¹ Those portions of the opinion of Brett, L. J. which are enclosed in brackets are taken from the report of the case in 47 L. J., C. L. 238.

² The fact that the defendant was angry when he made the statements is sufficient evidence of malice to support a verdict, *Robinson v. Van Auken*, 190 Mass. 161 (1906), or that he had expressed a desire to injure the plaintiff, *Hollenbeck v. Ristine*, 105 Iowa 488 (1898), or that he had made other defamatory statements or repeated the same charges on prior or subsequent occasions, *Tarpley v. Blabey*, 2 Bing. N. C. 437 (1836); *Seaman v. Netherclift*, L. R. 1 C. P. D. 540 (1876); *Evening Journal v. McDermott*, 44 N. J. L. 430 (1882), unless such occasions were themselves privileged, *Fahr v. Hayes*, 50

proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true,³ or he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive. I think I have laid down the correct rule on which to ground the direction to the jury, and I think the learned judge did not follow that rule, but he so expressed himself that the jury would be misled into following other rules. I think the jury were misled into believing that the burden of proof, that the defendant was not actuated by malice in the statements he had made, lay upon the defendant rather than on the plaintiff. I apprehend the moment the judge rules that the occasion is privileged, the burden of showing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is thrown upon the plaintiff.⁴ I also think that the learned judge was mistaken in the definition of malice he gave to the jury, and the jury might have been misled by his leaving to them to apply that definition to the question of what was malice in fact. I am

N. J. L. 275 (1888), p. 281, or that the relation between the parties was strained, *Thomas v. Bradbury, Agnew & Co.*, L. R. 1906, 2 K. B. 627, *Dickson v. Earl of Wilton*, 1 F. & F. 419 (1859), or that they had quarreled, *Rogers v. Clifton*, 3 B. & P. 587 (1803), or that the plaintiff had given the defendant cause to desire revenge, *Comfort v. Young*, 100 Iowa 627 (1897), where the plaintiff had caused the defendant to be prosecuted for operating a creamery on Sunday or any other fact from which the existence of ill-will on the defendant's part can be legitimately inferred, *Kelly v. Partington*, 4 B. & Ad. 700 (1833); *Hemmings v. Gasson*, E. B. & E. 346 (1858); *McGaw v. Hamilton*, 184 Pa. St. 108 (1898). As to effect of the fact that the information is volunteered as evidence of malice, see *Pattison v. Jones*, ante, p. 1096.

³Accord: *Briggs v. Garrett*, 111 Pa. St. 404 (1886), "a lie is never privileged," "it is mistakes, not lies, that are protected under the doctrine of privilege"—Paxson, J., p. 414; *Gassett v. Gilbert*, 6 Gray 94 (Mass. 1859); *State v. Schmitt*, 49 N. J. L. 579 (1887), and see *Holmes v. Clisby*, 121 Ga. 241 (1904), p. 246.

⁴If the court finds that the occasion is privileged the burden of proving malice rests on the plaintiff, *Bearce v. Bass*, 88 Maine 521 (1896); *Hagan v. Hendry*, 18 Md. 177 (1862); *Simmons v. Holster*, 13 Minn. 249 (1868); *King v. Patterson*, 49 N. J. L. 417 (1887); *Barry v. McCollom*, 81 Conn. 293 (1908); *McDavitt v. Boyer*, 169 Ill. 475 (1897); *Jenoure v. Delmege*, L. R. 1891, A. C. 73; *Bacon v. Michigan Cent. R. Co.*, 66 Mich. 166 (1887); *Hemmings v. Nelson*, 138 N. Y. 517 (1893); *Gray v. Pentland*, 4 Serg. & R. 420 (Pa. 1819); *Brockerman v. Keyser*, 8 Legal Int. 238 (Pa. 1851); *Missouri Pac. R. Co. v. Richmond*, 73 Tex. 568 (1889); *Strode v. Clement*, 90 Va. 553 (1894); *Chambers v. Leiser*, 43 Wash. 285 (1906); *Locke v. Bradstreet Co.*, 22 Fed. 771 (1885). Contra: *Wakefield v. Smithwick*, 49 N. Car. 327 (1857); and see *Atwater v. Morning News Co.*, 67 Conn. 504 (1896); and this requires the plaintiff, if he questions the defendant's belief in the truth of his statements, to prove that the defendant had no honest belief, *Jenoure v. Delmege*, L. R. 1891, A. C. 73.

In *Conroy v. Pittsburgh Times*, 139 Pa. St. 334 (1891), it is held that where the alleged libel or slander charges an indictable offense, there is a presumption of innocence thereof, throwing on the defendant the burden of proving that the charge was made in good faith and on probable cause, see contra, *McDavitt v. Boyer*, 169 Ill. 475 (1897), and such accusations can only be justified by proof of such probable cause for believing them, *Shelly v. Sampman*, 1 Pa. Sup. Ct. 115 (1896), and such inquiry as would justify in-

further of opinion that the direction to the jury—that assuming that the occasions were privileged if they thought that the defendant wrote the letter, and made the statements bona fide, and in the honest belief that they were true, not merely that he believed them himself, but honestly believed them, which means that he had good grounds for believing them to be true,—left the jury to suppose that, although the defendant did believe them in fact, yet that did not protect him unless his belief was reasonable: whereas the only question was whether the defendant did, in fact, believe what he said, and not whether a reasonable man would have believed it. The question of wilful blindness, or of an obstinate adherence to an opinion, may be tests by which a jury may be led to consider whether the defendant did or did not really believe the statements he made;⁵ whereas the learned judge, by the way in which he directed the jury, left them to understand, as I think, that although the defendant did believe the statements, yet if his belief was founded on a wrong reasoning that he was not within the protection of the privilege. (Questions of pig-headedness and obstinacy may be tests as to whether a man really did honestly believe or not, but Baron Huddleston left them as if they were of the essence of the definition of malice.) In that respect, with great deference I think, the learned judge's direction to the jury was erroneous.⁶

stituting a prosecution, *Neeb v. Hope*, 111 Pa. St. 145 (1886), *semble*, *Ingram v. Reed*, 6 Pa. Sup. Ct. 550 (1897); *Collins v. Morning News*, 6 Pa. Sup. Ct. 330 (1898), and see *Coates v. Wallace*, 4 Pa. Sup. Ct. 253 (1897), holding that one publishing statements aspersing the character of a candidate for office must show the circumstances which led him to believe his charges to be true.

⁵ The facts within the defendant's knowledge are always admissible to prove or disprove the absence of honest belief, *Fountain v. Boodle*, 3 A. & E. (N. S.) 5 (1842); *Gassett v. Gilbert*, 6 Gray 94 (Mass. 1858); *Bradley v. Heath*, 12 Pick. 163 (Mass.); *Atwill v. Mackintosh*, 120 Mass. 177 (1876); *Wagner v. Scott*, 164 Mo. 289 (1901), especially where the charge is against a public officer. *Fairman v. Ives*, 5 B. & Ald. 642 (1822); *Robinson v. May*, 2 Smith 3 (1804). See also *Sunley v. Met. Life Ins. Co.*, 132 Iowa 123 (1906), in which it is assumed that the fact that the plaintiff had properly accounted with the defendant's agent was equivalent to knowledge on the part of such agent of the true state of that account.

⁶ The defendant's belief may be founded on hearsay, *Aberdeen v. Macleay*, 9 Times L. R. 539 (1893); *Briggs v. Garrett*, 111 Pa. St. 404 (1886); *Mailand v. Bramwell*, 2 F. & F. 623 (1861), and this though the defendant's only ground of her belief is her implicit confidence in her informant, *Hesketh v. Brindle*, 4 Times L. R. 199 (1888), a daughter writing under her own name at her father's dictation, though it is better to state the source of one's information, as by producing or quoting the letter which conveys the information, *Robshaw v. Smith*, 28 L. T. 423 (1878); *Briggs v. Garrett*, 111 Pa. St. 404 (1886); *Elliott v. Garrett*, L. R. 1902, 1 K. B. 870, in which it seems to be suggested that it may be the defendant's duty to investigate the truth of the matter stated to him by third persons. But a defendant who signs a letter without taking care to ascertain its contents is not protected by his belief that it contained only statements which he was entitled to communicate and which he believed true, *Holmes v. Clisby*, 121 Ga. 241 (1904), and in *Met. Life Ins. Co. v. Sunley*, 132 Iowa 123 (1906), it was held that the knowledge of the defendant's agent was its knowledge and that a statement made by its home office in good faith in reliance on an agent's report was malicious in fact if he knew facts which made it false. The mere fact that the defendant admits that he cannot prove the truth of his statements does not

Assuming that the right question had been left to the jury, is there any evidence to support the finding of malice? Now, the occasion being privileged, the burden of proof to show that the defendant was not within the protection of the privilege being on the plaintiff, and it being an admitted fact that the defendant did not know the plaintiff, had never even seen him, and that he had no relations with him whatever, and no motive can be suggested why the defendant should have a vindictive feeling against the plaintiff, I think that the discrepancies which were relied upon, and the want of care in instituting inquiries, are too slight to justify a judge in asking the jury whether the defendant was actuated by indirect motives in making the statements. He certainly did not make them from a want of belief in them, nor was he influenced by anger in making them, not caring whether they were true or false.⁷

TOOTHAKER v. CONANT.

Supreme Judicial Court of Maine, 1898. 91 Maine 438.

PETERS, C. J. The exceptions, in this action of slander, ever so brief, are as follows: "The defendant claimed the words used were privileged, and requested the presiding justice to instruct the jury that the question for them to decide was not whether the language used was true, nor whether the defendant had reasonable ground to believe it to be true, but whether he honestly believed it to be true. This the justice refused to do and instructed the jury that he must have reasonable and probable grounds for his belief or his belief would be no defense. The verdict was for the plaintiff. To which refusal the defendant excepts."

There is nothing to inform us what the alleged slanderous words were, nor what the circumstances were under which the words were spoken. While the phrase "honest belief" may be found in legal opinions which undertake to define privileged communications, the phrase without addition or qualification is not adequate and sufficient as a definition of the law of justification for what would otherwise be regarded as slanderous words. A man may inflict an injury upon another without intending any injury, and still be liable for his unjustifiable act. Malice in the popular sense need not appear in order to sustain an action for slander. Even acci-

destroy his privilege. *Billings v. Fairbanks*, 139 Mass. 66 (1885). As to whether mere honest suspicion is enough compare the above case, where the defendant accused the plaintiff of theft in the presence of a third person, with *Smedley v. Soule*, 125 Mich. 192 (1900), where the accusation was against a public official.

⁷ *Accord: Barry v. McCollum*, 81 Conn. 293 (1908); *Bays v. Hunt*, 60 Iowa 251 (1882); *Hemmens v. Nelson*, 138 N. Y. 517 (1893); *Haft v. Bank*, 19 App. Div. 423 (N. Y. 1897); *Chambers v. Leiser*, 43 Wash. 285 (1906). In some jurisdictions, while the precise question has not arisen, it is said without qualification that the statement must be made "in good faith", *Bacon v. Michigan Cent. R. Co.*, 66 Mich. 166 (1887); *Gattis v. Kilgo*, 128 N. Car. 402 (1901).

dental injuries are actionable unless the person causing the injury be free from all fault. Carelessness which causes an injury is generally a sufficient foundation for an action. But a person may through carelessness or negligence commit a wrongful act, and honestly think or believe he is doing no wrong. And the defendant here, in order to clear himself from the imputation of carelessness, should show not only that he was acting in an honest belief that the story communicated by him was true, but that there were reasonable grounds to induce such belief. Otherwise, an injury might be wrongfully inflicted upon an innocent person and he have no remedy or redress for it. *Bearce v. Bass*, 88 Maine, 543, is cited by the defense where the learned justice adopted in his opinion the phrase "honest belief," but he added thereto the words, "such belief being founded on reasonable and probable grounds."

*Exceptions overruled.*¹

¹ *Accord: Hebner v. Gt. Northern R. Co.*, 78 Minn. 289 (1899); *Carpenter v. Bailey*, 53 N. H. 590 (1873); *Briggs v. Garrett*, 111 Pa. St. 404 (1886); *Mulderig v. Wilkesbarre Times*, 215 Pa. St. 470 (1906); *Ranson v. West*, 125 Ky. 457, *semble*. In *Carpenter v. Bailey*, *Briggs v. Garrett* and *Mulderig v. Times*, the defamation published was of a public official or candidate for office, see note 3 to *Coleman v. MacLennan*, *ante*, p. 1073, and see *Odgers, Slander and Libel*, 4th ed., p. 342, citing *Fairman v. Ives*, 5 B. & Ald. 642 (1822), and *Robinson v. May*, 2 Smith 3 (Eng. K. B. 1804), and see *Smedley v. Soule*, 125 Mich. 192 (1900). So it was held in *Locke v. Bradstreet Co.*, 22 Fed. 771 (C. C. East. Dist. of Minn. 1885), and *Douglas v. Daisley*, 114 Fed. 628 (C. C. A. 1st Circ. 1902), that reports by commercial agencies to their subscribers are only privileged if care is taken to secure and publish reliable information.

In *McNally v. Burleigh*, 91 Maine 22 (1897), it is said that there must be belief "based upon reasonable and probable grounds after a reasonably careful inquiry"; and compare *Neeb v. Hope*, 111 Pa. St. 145 (1886), with *Briggs v. Garrett*, 111 Pa. St. 404 (1886) and *Evening Post Co. v. Richardson*, 113 Ky. 641 (1902).

CHAPTER IV.

Acts Necessary to Secure One's Economic Advancement by Acts Necessarily or Intentionally Harmful to Others.

SECTION 1.

Nature of the Harm Done—Interference With Business or Employment.

- (a) By inducing third persons to break their contracts with the plaintiff.
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Form of action given in La Court De Baron, (Circa 1300). The Court Baron (Seldon Soc. Vol. IV) 40. Sir steward, William (Vintner) of Woodstock, who is here, complaineth of (Robert) Baker, who is there, that wrongfully he supplanted him of a ton of wine of a merchant of Southampton, Bernard Taney by name, which (the plaintiff) bought of him (Bernard) for 36 s. and gave (earnest) and found pledges to duly pay the said sum on a certain day without any delay; this done, came the said Robert and in despite of (William), who is here, spake so much ill and villany of him to the merchant and drove his own bargain so that the merchant increased the price of the ton to 40 s.; and the said William hired a cart with four horses for a half-mark to carry the ton from Southampton to his house at Woodstock; and when he came to Southampton he found that owing to what Robert had said the merchant was now of another mind, that he would not let him (have the wine) and told him right out that he heard tell so much evil of him that he would give him no credit; and so (William) returned from the port with the cart he had hired as empty as when he took it thither, and none the less had to pay for its hire on the day fixed for payment; so that wrongfully and without reason did he (Robert) speak evil of and procure evil for him (William) to his damage of 40 s. and shame of 100 s. If confess etc.

Tort and force and all that to tort belongeth, defendeth (Robert), who is here, against William of Woodstock, who is there, and his damages of 40 s. and shame of 100 s. and every penny of it, both against him and against his suit and all that he surmiseth against him; and well he sheweth thee that never did he supplant him of the said ton or raise the price against him by 4 s. or any penny as he surmiseth; and of this he is ready to acquit himself in all such wise as this court shall award that acquit himself he ought.

Fair friend Robert (saith the steward), this court awardeth that thou be at a law six-handed at the next (court) etc.

LUMLEY v. GYE.

Court of Queen's Bench, 1853. 2 Ellis & Blackburn's Reports, 216.

The first count of the declaration stated that the plaintiff was lessee and manager of the Queen's Theatre for performing operas for gain to him; and that he had contracted and agreed with Johanna Wagner to perform in the theatre for a certain time, with a condition, amongst others, that she should not sing nor use her talents elsewhere during the term without plaintiff's consent in writing. Yet defendant, knowing the premises, and maliciously intending to injure plaintiff as lessee and manager of the theatre, whilst the agreement with Wagner was in force, and before the expiration of the term, enticed and procured Wagner to refuse to perform; by means of which enticement and procurement of defendant, Wagner wrongly refused to perform, and did not perform during the term.

Count 2. For enticing and procuring Johanna Wagner to continue to refuse to perform during the term, after the order of Vice Chancellor Parker, affirmed by Lord St. Leonard (see *Lumley v. Wagner*, 1 DeG. McN. & G. 604), restraining her from performing at a theatre of defendant's.

Count 3. That Johanna Wagner had been and was hired by plaintiff to sing and perform at his theatre for a certain time, as the dramatic artiste of plaintiff, for reward to her, and had become and was such dramatic artiste of plaintiff at his theatre. Yet defendant, well knowing, &c., maliciously enticed and procured her, then being such dramatic artiste, to depart from the said employment.

In each count special damage was alleged.

Demurrer. Joinder.¹

ERLE, J. The question raised upon this demurrer is, Whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time; whereby damage was sustained? And it seems to me that it will. The authorities are numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for, there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided, and that, as those have related to contracts respecting trade, manufactures, or household service, and not to performance at a theatre, therefore they are no authority for an action in respect of a contract for such performance; the answer appears to me to be, that the class of cases referred to rests upon the

¹ The opinion of Crompton, J., is much abridged and that of Wightman, J., is omitted.

principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. Where the right to a performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and, if he is made to indemnify for such breach, no further recourse is allowed; and, in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence, nor easy of proof, therefore the action for this wrong, in respect of other contracts than those of hiring, are not numerous; but still they seem to me sufficient to show that the principle has been recognized. In *Winsmore v. Greenbank*, Willes, 577, it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and other cases of contract is, that the wife is not liable to be sued: but the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In *Green v. Button*, 2 C. M. & R. 707, it was decided that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Shepherd v. Wakeman*, 1 Sid. 79, is to the same effect, where the defendant procured a breach of a contract of marriage by asserting that a woman was already married. In *Ashley v. Harrison*, 1 Peake's N. P. C. 194, S. C. 1 Esp. N. P. C. 48, and in *Taylor v. Neri*, 1 Esp. N. P. C. 386, it was properly decided that the action did not lie, because the battery, in the first case, and the libel, in the second case, upon the contracting parties were not shown to be with intent to cause those persons to break their contracts, and so the defendants by their wrongful acts did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me they would have been liable to the plaintiff. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least Lord Mansfield's judgment in *Bird v. Randall*, 3 Burr. 1345, is to that effect. This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery; and both ought on the same ground to be made responsible. The remedy on the contract may be inadequate, as where the meas-

ure of damages is restricted; or in the case of non-payment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or, in the case of the non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and in my judgment ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto.

The result is that there ought to be, in my opinion, judgment for the plaintiff.²

COLERIDGE, J. In order to maintain this action, one of two propositions must be maintained; either that an action will lie against any one by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action, for seducing a servant from the master or persuading one who has contracted for service from entering into the employ, is of so wide application as to embrace the case of one in the position and profession of Johanna Wagner. After much consideration and inquiry I am of opinion that neither of these propositions is true and they are both of them so important, and, if established by judicial decision, will lead to consequences so general, that, though I regret the necessity, I must not abstain from entering into remarks of some length in support of my view of the law.

It may simplify what I have to say, if I first state what are the conclusions which I seek to establish. They are these: that in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued; that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Laborers, 23 Edw. 3, and both on principle and according to authority is limited by it. If I am right in these positions, the conclusion will be for the defendant, because enough appears on this record to show,

² The learned judge there holds that it is clear law that one who "wrongfully and maliciously, or, which is the same thing, with notice" interrupts the relation of master and servant by procuring the servant to leave the master's service or by employing him after he has left commits a legal wrong against the master, and that the relation of master and servant exists as soon as there is a binding contract of hiring and service and it is unnecessary that the servant has actually entered upon the service.

as to the first, that he, and, as to the second, that Johanna Wagner, is not within the limits so drawn.

First, then, that the remedy for breach of contract is by the general rule of our law confined to the contracting parties. I need not argue that, if there be any remedy by action against a stranger, it must be by action on the case. Now, to found this, there must be both injury in the strict sense of the word (that is a wrong done), and loss resulting from that injury: the injury or wrong done must be the act of the defendant; and the loss must be a direct and natural, not a remote and indirect, consequence of the defendant's act. Unless there be a loss thus directly and proximately connected with the act, the mere intention, or even the endeavor, to produce it will not found the action. The existence of the intention, that is the malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, or its hurtful consequence: however complete the injuria, and whether with malice or without, if the act be after all *sine damno* no action on the case will lie. If a contract has been made between A and B that the latter should go supercargo for the former on a voyage to China, and C, however maliciously, persuades B to break his contract, but in vain, no one, I suppose, would contend that any action lay against C. On the other hand, suppose a contract of the same kind made between the same parties to go to Sierra Leone, and C urgently and bona fide advises B to abandon his contract, which on consideration B does, whereby loss results to A; I think no one will be found bold enough to maintain that no action would lie against C.³ In the first case no loss has resulted; the malice has been ineffectual; in the second, though a loss has resulted from the act, the act was not C's, but entirely and exclusively B's own.⁴ If so, let malice be added, and let C have persuaded, not *bona fide* but *mala fide* and maliciously, still, all other circumstances remaining the same, the same reason applies; for it is *malitia sine damno*, if the hurtful act is entirely and exclusively B's, which last circumstance cannot be affected by the presence or absence of malice in C. Thus far I do not apprehend much difference of opinion; there would be such a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what after all is his own act, and for the whole of the hurtful consequences of which the law makes him directly and fully responsible, that I believe it will never be contended for seriously. But it will be said that this declaration charges

³ In *Bowen v. Hall*, L. R. 6 Q. B. D. 333 (1881), Brett, L. J. says, p. 338, "Merely to persuade a person to break his contract, may not be unlawful in fact or law as in the second case put by Coleridge, J. But if the persuasion be used for the indirect purpose of injuring the plaintiff or benefitting the defendant at the expense of the plaintiff, it is a malicious act which is in law and fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it."

⁴ See Brett, L. J., in *Bowen v. Hall*, *supra*, Note 3, at pp. 338-339.

more than is stated in the case last supposed, because it alleges, not merely a persuasion or enticement, but a procuring. In *Winsmore v. Greenbank*, Willes, 577, the same word was used in the first count of the declaration, which alone is material to the present case; and the Chief Justice who relied on it, and distinguished it from enticing, defined it to mean "persuaded with effect;" and he held that the husband might sue a stranger for persuading with effect his wife to do a wrongful act directly hurtful to himself. Persuading with effect, or effectually or successfully persuading, may no doubt sometimes be actionable—as in trespass—even where it is used towards a free agent; the maxims, *qui facit per alium facit per se* and *respondeat superior*, are unquestionable; but, where they apply, the wrongful act done is properly charged to be the act of him who has procured it to be done. He is sued as a principal trespasser, and the damage, if proved, flows directly and immediately from his act, though it was the hand of another, and he a free agent, that was employed. But when you apply the term of effectual persuasion to the breach of a contract it has obviously a different meaning; the persuader has not broken and could not break the contract, for he had never entered into any; he cannot be sued upon the contract; and yet it is the breach of contract only that is the cause of damage. Neither can it be said in breaking the contract the contractor is the agent of him who procures him to do so; it is still his own act; he is the principal in so doing, and is the only principal. This answer may seem technical; but it really goes to the root of the matter. It shows that the procurer has not done the hurtful act; what he has done is too remote from the damage to make him answerable for it.⁶ Now we find a plentiful supply both of text and decision in the case of seduction of servants: and what inference does this lead to, contrasted with the silence of the books and the absence of decisions on the case of breach of ordinary contracts? Let this, too, be considered: that, if by the common law it was actionable effectually to persuade another to break his contract to the damage of the contractor, it would seem on principle to be equally

⁶ "The case itself of *Winsmore v. Greenbank*, Willes, 577, seems to me to have little or no bearing on the present: a wife is not, as regards her husband, a free agent or separate person; if to be considered so for the present purpose, she is rather in the character of a servant, with this important peculiarity, that, if she be induced to withdraw from his society and cohabit with another or do him any wrong, no action is maintainable by him against her. In the case of criminal conversation, trespass lies against the adulterer as for an assault upon her, however she may in fact have been a willing party to all the defendant had done. No doubt, therefore, effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing her; and so, in other counts of the declaration, was it charged in this very case of *Winsmore v. Greenbank*. A case explainable and explained on the same principle is that of ravishment of a ward. The writ for this lay against one who procured a man's ward to depart from him; and, where this was urged in a case hereafter to be cited (Mich. 11 H. 4, fol. 23 A. pl. 46.) Judge Hankford (William Hankford, Justice of the Common Pleas in 1368, afterward in 1414 (1 H. 5), Chief Justice of England) gives the answer: the reason is, he says, because the ward is a chattel, and vests in him who has the right."

so to uphold him, after the breach, in continuing it.* The true ground on which this action was maintainable, if at all, was the Statute of Laborers,⁷ to which no reference was made. But I mention this case now as showing how far courts of justice may be led if they allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts. To draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice; who shall say how much of a free agent's resolution flows from the interference of other minds, or the independent resolution of his own? This is a matter for the casuist rather than the jurist; still less is it for the juryman. Again, why draw the line between bad and good faith? If advice given *mala fide*, and loss sustained, entitles me to damages, why, though the advice be given honestly, but under wrong information, with a loss sustained, am I not entitled to them? According to all legal analogies, the bona fides of him who, by a conscious wilful act, directly injures me, will not relieve him from the obligation to compensate me in damages for my loss. Again, where several persons happen to persuade to the same effect, and in the result the party persuaded acts upon the advice, how is it to be determined against whom the action may be brought, whether they are to be sued jointly or severally, in what proportion damages are to be recovered? Again, if, instead of limiting our recourse to the agent, actual or constructive, we will go back to the person who immediately persuades or procures him one step, why are we to stop there? The first mover, and the malicious mover too, may be removed several steps backward from the party actually induced to break the contract: why are we not to trace him out? Morally he may be the most guilty. I adopt the arguments of Lord Abinger and my brother Alderson in the case of *Winter-*

*"Now upon this the two conflicting cases of *Adams v. Bafeald*, 1 Leon. (part 1) 240, and *Blake v. Lanyon*, 6 T. R. 221, are worth considering. In the first, two Judges against one decided that an action does not lie for retaining the servant of another, unless the defendant has first procured the servant to leave his master; in the second, this was overruled; and, although it was taken as a fact that the defendant had hired the servant in ignorance and, as soon as he knew that he had left his former master with work unfinished, requested him to return, which we must understand to have been a real, earnest request, and only continued him after his refusal, which we must take to have been his independent refusal, it was held that the action lay; and this reason is given: "The very act of giving him employment is affording him the means of keeping out of his former service." Would the Judges who laid this down have held it actionable to give a stray servant food or clothing or lodging out of charity? Yet these would have been equally means of keeping him out of his former service.

"Item, if any reaper, mower, or other workman or servant, of what estate or condition that he be, retained in any man's service, do depart from the said service without reasonable cause or license, before the term agreed, he shall have pain of imprisonment. And that none under the same pain presume to receive or to retain any such in his service."—Statute of Laborers, 23 Edw. III, c. 11 (1349).

bottom v. Wright, 10 M. & W. 109; if we go the first step, we can show no good reason for not going fifty.*

Judgment for plaintiff.*

SWAIN v. JOHNSON.

Supreme Court of North Carolina, 1909. 151 N. Car. 93.

BROWN, J. The plaintiff contends that he contracted with the defendant Noble to purchase all the pine and juniper timber on certain lands belonging to the Cox heirs, said Noble being their attorney in fact, with power to sell the land; that the defendants West

*The rest of the opinion of Coleridge, J., holding after an exhaustive and able review of the early cases, that the law in relation to the seduction of servants is an exception, the origin of which was known, and that the exception did not reach the case of a theatrical performer, is omitted. In it he reviews the early cases both at common law and under the Statute of Laborers, pointing out that the first allowed recovery in trespass only for the forcible taking of a servant, while the Statute of Laborers only applied to menial household servants, agricultural laborers and artificers, to which the action on the case thereon was confined. See, also, Macomber, J., in *Johnston Harvester Company v. Meinhardt*, 60 How. Pr. 168 (N. Y. 1880).

**Accord: Bowen v. Hall*, L. R. 1881, 6 Q. B. D. 333, the defendants induced one Pearson, a brickmaker who possessed a secret process of making glazed brick and who had contracted to supply his whole product to the plaintiff, to break his contract and supply such bricks to them; *National Phonograph Co. v. Edison Co.*, L. R. 1908, 1 Ch. 335, holding that this rule applies to contracts of whatsoever nature; but see Joyce, J., *contra*, treating as absurd the idea that an action would lie against a successful rival who induced the plaintiff's promised bride to marry him instead; *Walker v. Cronin*, 107 Mass. 555 (1871); *Moran v. Dunphy*, 177 Mass. 485 (1901); *Beekman v. Marsters*, 195 Mass. 205 (1907); *Bitterman v. L. & N. O. R. Co.*, 207 U. S. 205 (1907), defendant bought for resale non-transferable return railway tickets, *Tubular Rivet Co. v. Exeter Boot Co.*, 159 Fed. 824 (1908); *Motley, Green Co. v. Detroit Steel & Spring Co.*, 161 Fed. 389 (1908); *Tennessee Coal, Iron & Ry. Co. v. Kelly*, 163 Ala. 348 (1909), *semble*; *Raycroft v. Tayntor*, 68 Vt. 219 (1896), *semble*; *Employing Prints' Club v. Blosser Co.*, 122 Ga. 509 (1905), *semble*; *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611 (1902), *semble*; *Thatcher Coal Co. v. Burke*, 59 W. Va. 253 (1906); *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556 (1908); *Joyce v. Great Northern R. Co.*, 100 Minn. 225 (1907), *semble*; *Chipley v. Atkinson*, 23 Fla. 206 (1887); *Martens v. Reilly*, 109 Wis. 464 (1901); *Flaccus v. Smith*, 199 Pa. St. 128 (1901); *Doremus v. Hennessy*, 176 Ill. 608 (1898); *Huskie v. Griffin*, 75 N. H. 345 (1909).

In many cases, while the law is stated broadly as in the principal case, the breach of the contract was procured by means in themselves unlawful, as, fraud, false statements, *Van Horn v. Van Horn*, 52 N. J. L. 284 (1890), bribery, *Angle v. Chicago R. Co.*, 151 U. S. 1 (1894), boycotting or other intimidation, *Club v. Blosser*, *supra*, *Doremus v. Hennessy*, 176 Ill. 608 (1898), or by a combination illegal by statute, *Joyce v. Great Northern R. Co.*, *supra*.

In *Tennessee Coal & Iron Co. v. Kelly*, *Chipley v. Atkinson*, *Raycroft v. Tayntor*, *Moran v. Dunphy*, *supra*, it is held that the unjustifiable procurement of the termination of a contract terminable at will, is as wrongful as procuring the breach of a contract irrevocably binding the party breaking it. But no action lies for procuring the breach of a contract void as against public policy, *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373 (1911).

and Johnson conspired together and induced Noble to violate his contract with plaintiff by purchasing the lands from Noble for a corporation, the West Lumber Company, in which West and Johnson are interested. Wherefore, for such alleged tort, the plaintiff claims substantial damage.

The principle of law upon which plaintiff found his right of action is thus stated in Comyn's Digest, Action on Case A: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. The intentional causing such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong."

This principle has been applied in some jurisdictions to the violation of contracts for personal service, and was so applied in this State in *Haskins v. Royster*, 70 N. C., 601, although by a divided court. It has been applied to the malicious enticing away of a workman; to the loss of a contract of marriage by means of a false and malicious letter; to maliciously enticing and inducing a wife to remain away from her husband, and to maliciously inducing an opera singer to abandon her contract; but we find no case in any court where it has ever been applied to breaches of contracts to convey title to property. It is true that in *Jones v. Stanley*, 76 N. C., 356, it was applied where the president of a railroad company maliciously prevented his company from performing a contract of carriage of freight, and in that case Judge Rodman says "the same reasons cover every case where one person maliciously persuades another to break any contract with a third person." This is but a *dictum*, and in commenting on it the Supreme Court of Kentucky, in a well-considered opinion in *Chambers v. Baldwin*, 11 L. R. A., 547, says: "We have seen no other case where the doctrine is stated so broadly." This Kentucky authority, with the voluminous notes of the annotator and the numerous cases cited, support fully the text of Judge Cooley, that "an action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequences, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." Cooley on Torts, 497. To this rule there are but two generally recognized exceptions—one where servants and apprentices are induced from malicious motives to leave their master before the term of service expires, and the other arises where a person has been procured, *against his will* or contrary to his purpose, by coercion or deception of another, to break his contract. *Green v. Button*, 2 Crompt. M. & R., 707; *Ashley v. Dixon*, 48 N. Y., 430. This is based upon the idea that a person has no right to be protected against competition, but he has a right to be free from malicious and wanton interference in his private affairs.

If disturbance or loss comes as the result of competition or the exercise of like rights by others, it is *damnum absque injuria*. *Walker v. Cronin*, 107 Mass., 564.

It is only where the contract would have been fulfilled but for

the false and fraudulent representations of a third person that an action will lie against such third person. *Benton v. Pratt*, 2 Wend., 385, citing *Pasley v. Freeman*, 3 T. R. 51.

The case of *Ashley v. Dixon*, *supra*, is in every respect similar to the one under consideration. In that case the New York court holds: "If A has agreed to sell property to B, C may at any time before the title has passed induce A to sell it to him instead; and if not guilty of fraud or misrepresentation, he does not incur liability, and this is so, although C may have contracted to purchase the property of B. B cannot maintain an action upon the latter contract, as he cannot perform and can only look to A for a breach of the former." This doctrine is supported by abundant authority. Cooley on Torts, *supra*; *Otis v. Raymond*, 3 Conn., 413; *Young v. Covell*, 8 Johns. (N. Y.) 25; *Johnson v. Hitchcock*, 15 J. R. 185; *Gallager v. Brunell*, 6 Cow., 347; *Hutchins v. Hutchins*, 7 Hill, 104.

Tested by these generally accepted principles, the plaintiff has entirely failed, for he does not allege, and there is not a shred of evidence to prove, that Noble was ready and willing to perform his alleged contract with plaintiff, but that he was prevented, against his will, from so doing by the false and fraudulent representations of West and Johnson, or either of them.

The judgment is affirmed.¹

(b) By force, threats or other means tortious in themselves.

KEEBLE v. HICKERINGILL.

Court of King's Bench, 1809. 11 East's Reports, 574.

Action upon the case. Plaintiff declares that he was, 8th November in the second year of the queen, lawfully possessed of a close of land called Minott's Meadow, *et de quodam vivario, vocat.*

¹*Accord: Boyson v. Thorn*, 98 Cal. 578 (1893), defendant induced a hotel keeper to require the plaintiff and his wife to vacate rooms engaged by them; *Jackson v. Morgan*, 49 Ind. App. 376 (1911), defendant induced the plaintiff's partner to exclude him and admit the defendant; *Chambers & Marshall v. Baldwin*, 91 Ky. 121 (1891), a man, who had contracted to sell his tobacco to the plaintiff, induced to sell and deliver it to the defendant; *Bourlier Bros. v. Macauley*, 91 Ky. 135 (1891), facts very similar to *Lumley v. Gye*, the defendant inducing a popular actress to break her contract with the plaintiff and appear at his own theatre; *McCann v. Wolff*, 28 Mo. App. 447 (1888); *Glencoe Land Co. v. Hudson Bros. Co.*, 138 Mo. 439 (1897); *Ashley v. Dixon*, 48 N. Y. 430 (1872), defendant by offering a higher price induced one, who had contracted to sell land to the plaintiff, to convey it to himself; *Rosenau v. Empire Circuit Co.*, 131 App. Div. 429 (1909 N. Y.); *Sweeney v. Smith*, 167 Fed. 385 (Circ. Ct. East Dist. of Pa. 1909), defendants purchased bonds from a committee of bondholders, which had already to their knowledge contracted to sell them to the plaintiff; *aliter*, where the contract broken is unenforceable as not being in writing as required by the statute of frauds, and where the breach is procured by fraud, *Rice v. Manley*, 66 N. Y. 82 (1876); *Heywood v. Tillson*, 75 Maine 225 (1883), *semble*; but see *Perkins v. Pendleton*, 90 Maine 166 (1897), and see *Kline v. Eubanks*, 109 La. 241 (1902), and *Wolf & Sons v. New Orleans Tailor Made*

a decoy pond, to which divers wildfowl used to resort and come; and the plaintiff had at his own costs and charges prepared and procured divers decoy-ducks, nets, machines, and other engines for the decoying and taking of the wildfowl, and enjoyed the benefit in taking them; the defendant, knowing which, and *intending to damnify the plaintiff in his vivary, and to fright and drive away the wildfowl used to resort thither, and deprive him of his profit*, did; on the 8th of November, resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wildfowl then being in the pond; and on the 11th and 12th days of November the defendant, *with design to damnify the plaintiff, and fright away the wildfowl*, did place himself with a gun near the vivary, and there did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wildfowl were frightened away, and did forsake the said pond. Upon not guilty pleaded, a verdict was found for the plaintiff and £20 damages.

HOLT, C. J. I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, 1st, this using or making a decoy is lawful. 2dly, This employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy-ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not effect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; to say a merchant is broken, or that he is failing, or is not able to pay his debts, 1 Roll. 60. 1; all the cases there put. How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving

Pants Co., 113 La. 388 (1904), where the defendant engaged a salesman who had left the plaintiff's employment in breach of a contract with him. The defendant, when notified of this fact, offered to release the salesman from their contract, who refused to accept such release and said he would never return to the plaintiff's service. It was held that no action lay against the defendant for refusing to discharge the salesman.

profit by his employment. Now, there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6. 14. 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie because he had as much liberty to make and use a decoy as the plaintiff.¹ This is like the case of 11 H. 4. 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.)² But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents could not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 E. 3. 18.³ A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies because it imports damage. Action upon the case lies against one that shall by threats fright away his tenants at will. 9 H. 7. 8. 21 H. 6. 31. 9 H. 7. 7. 14 Ed. 4. 7. Vide *Rastal*. 662. 2 Cro. 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service.⁴

¹ So a man may attract game, even from his neighbor's lands, by placing corn and other food on his land, *Ibottson v. Peat*, 3 H. & C. 644 (1865).

² See Holmes, J., in *Vegetahn v. Guntner*, 167 Mass. 92 (1896). "It has been the law for centuries that a man may set up a business, in a country town too small to support more than one, although he expects and intends to ruin some one already there and succeeds in his intent." "The reason is that the doctrine of free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged."

³ Accord: *Tarleton v. McGawley*, 1 Peake 270 (1793), a declaration sustained which alleged that the defendant, a merchant trading with the natives of Cameroon, had fired a cannon at a canoe in which the natives were coming to the vessel of the plaintiff, a rival trader, for the purpose of trading, killing one of them and deterring them from trading with the plaintiff; so in *Standard Oil Co. v. Doyle*, 118 Ky. 662 (1904), threats, to put the plaintiff's customers out of business if they continued to deal with him, held actionable.

⁴ Accord: *Carrington v. Taylor*, 11 East 571 (1809); *Ibottson v. Peat*, 3 H. & C. 644 (1865), compare *Lanprev v. Dans*, 86 Minn. 317 (1902), and *Whittaker v. Stangvick*, 100 Minn. 386 (1907), and see *Prince de Wag-ram v. Marais*, Cour de Paris. (1871), Dalloz 73, 2, 185, defendant jealous of the success of the plaintiff's efforts to attract game by planting certain crops, instructed his servants to make so much noise as to frighten

GARRET v. TAYLOR.

Court of King's Bench, 1620. Croke James Reports, 567.

ACTION ON THE CASE.

WHEREAS, he was a free mason, and used to sell stones, and to make stone-buildings, and was possessed of a lease for divers years to come of a stone-pit in Hedington, in the county of Oxford, and digged divers stones there, as well to sell as to build withal; that the defendant, to discredit and to deprive him of the commodity of the said mine, imposed so many and so great threats upon his workmen, and all comers disturbed, threatening to mayhem and vex them with suits if they bought any stones; whereupon they all desisted from buying, and the other from working, etc.

After judgment by *nihil dicit* for the plaintiff, and damages found by inquisition to fifteen pounds, it was moved in arrest of judgment, that this action lay not; for nothing is alleged but only words, and no act nor insult; and causeless suits on fear are no cause of action.

Sed non allocatur: for the threatening to mayhem, and suits, whereby they durst not work or buy, is a great damage to the plaintiff, and his losing the benefit of his quarries a good cause of action; and although it be not shown how he was possessed for years, by what title, &c., yet that being but a conveyance to this action, was held to be well enough. And adjudged for the plaintiff.¹

(c) By interference with the freedom of opportunity to contract or to obtain labor or employment.

(The right to "the freedom of the market.")

THE JERSEY CITY PRINTING CO. v. CASSIDY.

Court of Chancery, New Jersey, 1902. 63 N. J. Equity, 759.

On motion, on order to show cause, for an injunction to restrain defendants, former employees of the complainant, and now on strike, from unlawful interference with the complainant's business,

away the game and spoil the sport of the plaintiff and his shooting party, Ames, 18 Harvard L. R. p. 416.

¹ Accord: *Standard Oil Co. v. Doyle*, 118 Ky. 662 (1904), defendants conspired to harass and annoy the plaintiff's employes while selling and delivering his wares; *Fratt Food Co. v. Bird*, 148 Mich. 631 (1907), injunction issued against a food commissioner of the state restraining him from threatening customers of the plaintiff with prosecutions, which it was not within his powers to institute, if they used its product as prepared by it; see also *Emack v. Kane*, 34 Fed. 46 (1888), injunction issued restraining

the employment of workmen, &c. Heard on bill, answer and affidavits.

Upon filing the bill an order was made restraining the defendants

"from in any manner knowingly and intentionally causing or attempting to cause by threats, offers of money, payment of money, offering to pay or the payment of transportation expenses, inducements or persuasions to any employee of the complainant under contract to render service to it to break such contract by quitting such service; from any and all personal molestation of persons willing to be employed by complainant with intent to coerce such persons to refrain from entering such employment; from addressing persons willing to be employed by complainant against their will and thereby causing them personal annoyance with a view to persuade them to refrain from such employment; from loitering or picketing in the streets near the premises of complainant, Nos. 68 and 70 York street, and No. 37 Montgomery street, Jersey City, with intent to procure the personal molestation and annoyance of persons employed or willing to be employed by complainant and with a view to cause persons so employed to quit their employment, or persons willing to be employed by complainant to refrain from such employment; from entering the premises of complainant, Nos. 68 and 70 York street, Jersey City, against its will with intent to interfere with its business; from violence, threats of violence, insults, indecent talk, abusive epithets, practiced upon any persons without their consent with intent to coerce them to refrain from entering the employment of complainant, or to leave its employment."

STEVENSON, V. C. The order does not interfere with the right of the workmen to cease his employment for any reasons that he deems sufficient. It does not undertake to say that workmen may not refuse to be employed if certain other classes of workmen are retained in employment. It leaves the workman absolutely free to abstain from work—for good reasons, for bad reasons, for no reasons. His absolute freedom to work, or not to work, is not in any way impaired. The restraining order is based upon the theory that the right of the workman to cease his employment, to refuse to be employed, and to do that in conjunction with his fellow-workmen, is just as absolute as is the right of the employer to refuse further to employ one man, or ten men, or twenty men, who have theretofore been in his employment. From an examination of the cases and a very careful consideration of the subject I am unable to discover any right in the courts, as the law now stands, to interfere with this absolute freedom on the part of the employer to employ whom he will, and to cease to employ whom he will; and the corresponding freedom on the part of the workman, for any reason or

defendants from issuing circulars threatening to bring suits for infringement against persons dealing in the plaintiff's patented article the charges of infringement not being made in good faith but with intent to injure the plaintiff's business, and *St. Johnsbury, etc., R. Co. v. Hunt*, 55 Vt. 570 (1882). See also, *Van Horn v. Van Horn*, 52 N. J. L. 284 (1890), and *Sparks v. McCreary*, 156 Ala. 382 (1908).

no reason, to say that he will not longer be employed; and the further right of the workmen, of their own free will, to combine and meet as one party, as a unit, the employer, who, on the other side of the transaction, appears as a unit before them. Any discussion of the motives, purposes or intentions of the employer in exercising his absolute right to employ or not to employ as he sees fit, or of the free combination of employees in exercising the corresponding absolute right to be employed or not as they see fit, seems to me to be in the air.

Thus, there is a wide field in which employees may combine and exercise the arbitrary right of "dictating" to their common employer "how he shall conduct his business." The exact correlative of this right of the employee exists, in an equal degree, in the employer. He may arbitrarily "dictate" to five thousand men in his employ in regard to matters in respect of which their conduct ought, according to correct social and ethical principles, to be left entirely free. But if the "dictation" is backed up solely by the announcement that, if it is not submitted to, the dictating party will refrain from employing, or refrain from being employed, as the case may be, no legal or equitable right belonging to the party dictated to, which I am able to discern, is thereby invaded.

Some of the expressions which I have used, and which are commonly used, in relation to this subject seem to me to be misleading. Union workmen who inform their employer that they will strike if he refuses to discharge all non-union workmen in his employ are acting within their absolute right, and, in fact, are merely dictating the terms upon which they will be employed. All such terms necessarily relate both to "how the employer shall conduct his business" and how the employees shall conduct their business.

The principles which I have endeavored to state are all recognized in the restraining order in this case, and are so plainly recognized that the intelligent and industrious counsel for the defendants is unable to point out any respect wherein the terms of the order should be modified. The things which the restraining order interdicts are things which, for the purposes of this argument, it is practically conceded the defendants have no right to do.

In this situation of the case it would seem to be unnecessary to further consider the legal propriety of the restraining order, much less to take it up clause by clause. I have, however, pointed out what conduct on the part of the defendants is excluded from the operation of this order, and I think that it is fair to all the parties to this suit who are concerned in the maintenance of the restraining order to explain, at least in a general way, what conduct is included within its prohibition. This can be most conveniently done by making plain the most important principles embodied in the order—principles which practically have been developed by the courts of this country and England during the last five or ten years.

That the interest of an employer, or an employee, in a contract for services is property is conceded. Where defendants, in combination or individually, undertake to interfere with and disrupt existing

contract relations between the employer and the employee, it is plain that a property right is directly invaded. The effect is the same whether the means employed to cause the workman to break his contract, and thus injure the employer, are violence or threats of violence against the employee or mere molestation, annoyance or persuasions. In all these cases, whatever the means may be, they constitute the cause of the breaking of a contract, and consequently they constitute the natural and proximate cause of damage. The intentional doing of anything by a third party which is the natural and proximate cause of the disruption of a contract relation, to the injury of one of the contracting parties, is now very generally recognized as actionable, in the absence of a sufficient justification, and the question, in every case, seems to turn upon justification alone.

Where the tangible property of an employer is seized or directly injured by violence, with intent to interfere with the carrying on of his business, the case, also, is free from embarrassment.

In the case of *Frank v. Herold*, 18 Dick. Ch. Rep. 443, Vice Chancellor Pitney amply discussed the whole subject of the unlawfulness of molestation and annoyance of employees, with intent and with the effect to induce them to abandon their employment, to the injury of their employer's business.

But the difficult case presents itself when the workmen in combination undertake to interfere with the freedom of action on the part of other workmen, who naturally would seek employment where they (the workmen in combination) desire and intend that no man shall be employed excepting upon their terms.

The difficulty is in perceiving how molestation and annoyance, not of the employees of a complainant, but of persons who are merely looking for work and may become employees of the complainant, can be erected into a legal or equitable grievance on the part of the complainant. But the difficulty is still further increased where the possible employees make no complaint to any court for protection, and the conduct of the molesting party does not afford a basis which the ancient common law recognized as sufficient to support an action of tort on their behalf, such as for an assault and battery or a slander. Abusive language is not necessarily actionable at the common law. If to call a man a "scab" in the street, or to follow him back and forth from his home to his place of employment, was formerly not actionable on behalf of the victim of this petty annoyance, the problem is to understand how one who is merely the victim's possible employer can complain, either at law or in equity, there being no actual contract for service, but only a potential one, interfered with.

It is easier, I think, to obtain a correct idea of the legal and equitable right which underlies many of the injunctions which have been granted in these strike cases restraining combinations of workmen from interfering with the natural supply of labor to an employer, by means of molestation and personal annoyance, if we exclude from consideration the conduct of the defendants as a cause of action on behalf of the immediate victims of their molestation—i. e.,

of the workman or workmen whom the combination are seeking to deter from entering into the employment which is offered to them, and which they, if let alone, would wish to accept. I say this, although I firmly believe that the molested workman, seeking employment and unreasonably interfered with in this effort by a combination, has an action for damages at common law, and, where the molestation is repeated and persistent, has the same right to an injunction, in equity, which, under the same circumstances, is accorded to his contemplated employer.

The underlying right in this particular case under consideration, which seems to be coming into general recognition as the subject of protection by courts of equity, through the instrumentality of an injunction, appears to be the right to enjoy a certain free and natural condition of the labor market, which, in a recent case in the house of lords, was referred to, in the language of Lord Ellenborough, as a "probable expectancy." This underlying right has otherwise been broadly defined or described as the right which every man has to earn his living, or to pursue his trade or business, without undue interference, and might otherwise be described as the right which every man has, whether employer or employee, of absolute freedom to employ or to be employed. The peculiar element of this, perhaps newly recognized right, is that it is an interest which one man has in the freedom of another. In the case before this court the Jersey City Printing Company claims the right, not only to be free in employing labor, but also the right that labor shall be free to be employed by it, the Jersey City Printing Company.

A large part of what is most valuable in modern life seems to depend more or less directly upon "probable expectancies." When they fail, civilization, as at present organized, may go down. As social and industrial life develops and grows more complex these "probable expectancies" are bound to increase. It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these "probable expectancies."

In undertaking to ascertain and define the rights and remedies of employers and employees, in respect of their "probable expectancies" in relation to the labor market, it is well not to lose sight altogether of any other analogous rights and remedies which are based upon similar "probable expectancies." It will probably be found in the end, I think, that the natural expectancy of employers in relation to the labor market and the natural expectancy of merchants in respect to the merchandise market, must be recognized to the same extent by courts of law and courts of equity and protected by substantially the same rules.

It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market. The valuable thing to merchant and to customer, to employer and to employee, manifestly is freedom on both sides of the market.

The merchant, with his fortune invested in goods and with perfect freedom to sell, might be ruined if his customers were deprived of their freedom to buy; the purchaser, a householder, seeking supplies for his family, with money in his pocket and free to buy, might find his liberty of no value and might suffer from lack of food and clothing if the shopmen who deal in these articles were so terrorized by a powerful combination as to be coerced into refusing to sell either food or clothing to him.

It is, however, the right of the employer and employee to a free labor market that is the particular thing under consideration in this case.

A man establishes a large factory where working people reside, taking the risk of his being able to conduct his industry and offer these working people employment which they will be willing to accept. He takes the risk of destructive competition and a large number of other risks, out of which, at any time, may come his financial ruin and the suspension of his manufacturing works. But our law, in its recent development, undertakes to insure him, not only that he may employ whom he pleases, but that all who wish to be employed by him may enter into and remain in such employment freely, without threats of harm, without unreasonable molestation and annoyance from the words, actions or other conduct of any other persons *acting in combination*. What is the measure or test by which the conduct of a combination or persons must be judged in order to determine whether or not it is an unlawful interference with freedom of employment in the labor market, and as such, injurious to an employer of labor in respect of his "probable expectancies," has not as yet been clearly defined. Perhaps no better definition could be suggested than that which may be framed by conveniently using that important legal fictitious person who has taken such a large part in the development of our law during the last fifty years—the reasonably prudent, reasonably courageous and not unreasonably sensitive man. Precisely this same standard is employed throughout the law of nuisance, in determining what degree of annoyance on the part of one's neighbor one must submit to, and what degree of such annoyance is excessive and the subject of an action for damages or a suit for an injunction.

A man may not be liable to an action for slander for calling a workman a "scab" in the street, but if half a hundred men combine to have this workmen denounced as a "scab" in the street, or followed in the streets to and from his home, so as to attract public attention to him and place him in an annoyingly conspicuous position, such conduct, the result of such combination, is held to be an invasion of the "probable expectancy" of his employer or contemplated employer, an invasion of this employer's *right to have labor flow freely to him*. Without any regard to the rights and remedies which the molested workman may have, the injunction goes at the suit of the employer to protect his "probable expectancy"—to secure freedom in the labor market to employ and to be em-

ployed, upon which the continuance of his entire industry may depend.

I think it is safe to say that all through this development of strike law, during the last decade, no principle becomes established which does not operate equally upon both employer and employee. The rights of both classes are absolutely equal in respect of all these "probable expectancies." An operator upon printing machines has the right to offer his labor freely to any of the printing shops in Jersey City. These shops may all combine to refuse to employ him on account of his race, or membership in a labor union, or for any other reason, or for no reason, precisely as twenty employees in one printing shop may combine and arbitrarily refuse to be further employed unless the business is conducted in accordance with their views. But in the case of the operative seeking employment, he has a right to have the action of the masters of the printing shops, in reference to employing him, left absolutely free. If, after obtaining, or seeking to obtain, employment in a shop, the master of that shop should be subjected to annoyances and molestation, instigated by the proprietors of other printing shops, who combine to compel, by such molestation and annoyance, this one master printer, against his will and wish, to exclude the operative from employment, this operative, in my judgment, would have a right to an action at law for damages, and would have a right to an injunction if his case presented the other ordinary conditions upon which injunctions issue. But the common-law courts have not had time to speak distinctly on this subject as yet, and it is necessary to be cautious in dealing with a subject in which both courts of law and courts of equity as yet are feeling their way.

I think that the leading principle enforced in the restraining order in this case is not inconsistent with any authorities which control this court. The principle is that a combination of employers, or a combination of employees, the object of which is to interfere with the freedom of the employer to employ, or of the employee to be employed (in either of which cases there is an interference with the enjoyment of "probable expectancy," which the law recognizes as something in the nature of property), by means of such molestation or personal annoyance as would be liable to coerce the person upon whom it was inflicted, assuming that he is reasonably courageous and not unreasonably sensitive, to refrain from employing or being employed, is illegal and founds an action for damages on the part of any person knowingly injured in respect of his "probable expectancy" by such interference, and also, when the other necessary conditions exist, affords the basis of an injunction from a court of equity.

The doctrine which supports that portion of the restraining order in this case which undertakes to interdict the defendants from molesting applicants for employment as an invasion of a right of the complainant, is applicable to a situation presenting either an employer or an employee as complainant, and containing the following elements:

First. Some person or persons desiring to exercise the right of employing labor, or the right of being employed to labor.

Second. A combination of persons to interfere with that right, by molestation or annoyance, of the employers who would employ, or of the employees who would be employed, in the absence of such molestation.

How far the element of combination of a number of persons will finally be found necessary, in order to make out the invasion of a legal or equitable right in this class of cases, need not be discussed. We are dealing with cases where powerful combinations of large numbers, in fact, exist.

Third. Such a degree of molestation as might constrain a person having reasonable fortitude, and not being unreasonably sensitive, to abandon his intention to employ or to be employed, in order to escape such molestation.

Fourth. As the result of the foregoing conditions, an actual pecuniary loss to the complaining party, by the interference with his enjoyment of his "probable expectancies" in respect of the labor market.

I do not think that the constraining force brought to bear upon the employer or employee which the law can interdict can ever include the power of public opinion or even of class opinion. Every man, whether an employer or an employee, constitutes a part of a great industrial system, and his conduct is open to the criticism of the members of his own class. While, therefore, a combination of union men have no right to cry "scab" in the streets to non-union employees, or to follow them in the street in a body to and from their homes, or do many other things *in combination*, which, if done once by a single individual, would not found an action of tort, such combinations, I think, have left a fairly wide field of effort towards the creation and application of public opinion as a constraining force upon conduct of any kind which they wish to discourage.¹

¹While later cases tend to recognize a right to the probability of benefit from the purely voluntarily, though probable, favorable actions of others, in no way legally bound to so act, and regard as legally wrongful any tortious interference by fraud, misrepresentation, force or threats with such person's activities, many of the older cases held that no such right existed and required that the plaintiff show a legal right to the present enjoyment of that of which the defendant's action had deprived him. Compare *Hutchins v. Hutchins*, 7 Hill 104 (N. Y. 1845) with *Lewis v. Corbin*, 195 Mass. 520 (1907), both cases where the defendant by false statements about the plaintiff induced a third person to alter his will to the plaintiff's disadvantage, and *Rice v. Manley*, 66 N. Y. 82 (1876), where the defendant induced a third person to break a contract with the plaintiff, the contract being legally unenforceable, not being in writing as required by the statute of fraud. The same tendency may be noted in such cases as *Urtz v. New York Central and Hudson River R. R. Co.* and *Austin v. Barrows*, *ante*, holding it to be insufficient for the plaintiff to show a proof of loss resulting from the defendant's wrong, that it prevented him obtaining a benefit, which to a high degree of probability would have accrued to him.

SECTION 2

The Actor's Economic Advancement as a Justification.

1. For the use of force, threats or other tortious means.

GOLDFIELD CONSOLIDATED MINES CO. v. GOLDFIELD MINERS UNION NO. 220.

Circuit Court, D. Nevada, 1908. 159 Fed. Rep. 500.

FARRINGTON, D. J. There is no law, nor is it within the power of this or any other court, to make an order by which Goldfield Consolidated Mines Company can be compelled against its will to re-employ any miner who quit, or any member of the Western Federation of Miners; neither can any member of that organization be compelled against his will to work for the company. The nonunion men have the same right to work or not work, to agree upon the terms of employment, or to quit work, as union men, no more, no less. They have a perfect right to take the vacated jobs if they can agree with the company upon terms, and the respondents have no legal right to dictate what those terms shall be. They have the right to seek employment, to come and go from their work,¹ or to go where they please on the public thoroughfare,² without fear or molestation, threats, violence, or insult of any kind. They have a right to come and go without being picketed, or compelled to listen to argument or persuasion, whether it be peaceful or irritating. The pickets have no legal right to insist that any nonunion man shall listen to their solicitations if he is unwilling to do so, it matters not how peaceful and friendly such solicitations may be.³ *Union Pac. R. Co. v. Ruef* (C. C.) 120 Fed. 114. And it necessarily follows that any attempt to intimidate a man in order to compel him to re-

¹ In *Murdock v. Walker, et al.*, 152 Pa. St. 595 (1893), strikers were enjoined from following workmen employed in their stead, and from gathering around their boarding places.

² "It makes no difference that the picketing is done 10 or 1,000 feet away" from the employer's premises, *Beck v. Teamsters' Protective Union*, 118 Mich. 497 (1898); *American Steel & Wire Co. v. Wire Drawers' Union*, 90 Fed. 608 (1898); *Ideal Mfg. Co. v. Ludwig*, 149 Mich. 133 (1907).

³ In *Jonas Glass Co. v. Glass Bottle Blowers Assn.*, 77 N. J. Eq. 219 (1910), following the decree in *Jersey City Printing Co. v. Cassidy, ante*, the members of the association were restrained from "addressing persons willing to be employed by complainant, against their will, and so causing them annoyance with a view to persuade them to refrain from such employment." "It is urged," says Pitney, V. C. in *Frank & Dugan v. Herold*, 63 N. J. Eq. 443 (1902), p. 449, "that one person has a right to persuade another to work or not to work that may be if the other person is willing to listen and be persuaded; but no person has the right to impose on another his arguments or persuasions against the will of that other person to listen. . . . No person has a right, strictly speaking, to accost an-

frain from exercising a legal right is unlawful, and this is true no matter whether the attempt is made by one man or many, or by a corporation or a labor union. Hence, if the pickets, or members of the respondent union, who gather at or near complainant's premises at the time of the morning and afternoon change of shifts, assail nonunion men with threats, ridicule, and insult, or follow them to or from their work with vile language and abusive epithets in order to compel them to quit work, or refrain from offering their labor to the complainant, they are guilty of unlawful conduct.

The affidavits on the part of the complainant, as well as other evidence in the case, convince the court that the company's premises are almost constantly picketed, day and night, by members of the Miners' Union; that there are altogether too many pickets, especially at the railroad crossing used by the workmen in going to and from the mines and mill to the company's boarding house. The unnecessary massing of so many men at this point is, in itself, an act of intimidation, which is further aggravated by insults, threats, and ridicule. It is not necessary that a man should be knocked down to be intimidated. The most reprehensible intimidation may exist not only without violence, but without words, or even the lifting of a finger. Whether conduct is intimidating or not depends upon the circumstances of each case. What would fill a timid man with fear might only provoke the mirth of a strong man; and a simple request, when backed up by a display of physical force, may overawe the most determined man, even though there is neither threat nor violence. The vast majority of wage-earners are peaceful, law-abiding men, who instinctively avoid trouble and the giving of offense. Such men would cease working, or refuse to work, if compelled to run the gauntlet of a picketing system such as the evidence shows is in force at and near complainant's premises in Goldfield. Notwithstanding the denials of the respondents, the affidavits of so many witnesses, guards, and employees who testify to what they have actually seen and heard, who have repeatedly passed by or made their way through squads of pickets at the crossing, and who were often the victim of ridicule, insult, and threat, leave no doubt in the mind of the court that the pickets were, in the main, members of the Goldfield Miners' Union; that they so assembled with a common purpose, and that purpose was to coerce and intimidate nonunion men who wished to work for, or who are already in the employ of the company. This conviction is strengthened by the fact that the complainant has 50 guards and deputy sheriffs in its employ for the protection of its employees. It is unreasonable to suppose that complainant would go to an expense of \$250 per day for this purpose if guards were not needed. *Otis Steel Co. v. Local Union No. 218* (C. C.) 110 Fed. 698. The fact that men have quit and refused to work, and the further fact that it is the custom to send and have the men go in a body between the mines and the company's boarding

other, or speak to him, without the express or implied consent of that other person."

house, and that guards are stationed on the way, show that there is something in the appearance, conduct, language, or numbers of the pickets which inspires fear among the employees of the company. It is significant that all these precautions are taken while a body of federal troops is stationed only a few hundred yards away. It also appears that the company cannot, by reason of the fear which exists, obtain a sufficient number of men to operate its mines. Peaceful picketing, in theory, is not only possible, but permissible, and, as long as it is confined strictly and in good faith to gaining information, and to peaceful persuasion and argument, it is not forbidden by law. Unfortunately, peaceful picketing is a very rare occurrence. This follows from the very nature of things.⁴ Men who want to work for an employer who is eager to employ them must be persuaded not to work—persuaded not to exercise their legal rights. In such case peaceable solicitation is of but little effect, and when it becomes persuasion by intimidation, it is universally condemned, and has been declared unlawful in every jurisdiction where the question has been raised. These views will find abundant support, not only in the cases which have been already cited, but in the following authorities: *In re Doolittle* (C. C.) 23 Fed. 545; *Mackall v. Ratchford*, (C. C.) 82 Fed. 41; *American Steel and Wire Co. v. Wire Drawers', etc., Unions* (C. C.) 90 Fed. 608, 614; *Southern R. Co. v. Machinists' Union* (C. C.) 111 Fed. 54; *Union Pac. R. Co. v. Ruef* (C. C.) 120 Fed. 124; *Knudsen v. Benn* (C. C.) 123 Fed. 636; *Atchison T. & S. F. Ry. Co. v. Gee* (C. C.) 139 Fed. 582, 584; *Pope Motor Car Co. v. Keegan* (C. C.) 150 Fed. 148; *Allis-Chalmers Co. v. Iron Molders' Union* (C. C.) 150 Fed. 155, 179; *Beck v. Ry. Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; *Vegelehn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Jensen v. Cooks' and Waiters' Union*, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302; *Fletcher Co. v. International Ass'n of Machinists* (N. J. Ch.) 55 Atl. 1077; *O'Neil v. Behanna*, 182 Pa. 236, 37 Atl. 843, 38 L. R. A. 382, 61 Am. St. Rep. 702; *Winslow Bros. Co. v. Building Trades Council*, 31 Chicago Legal News, 337, cited in note to *Jensen v. Cooks' and Waiters' Union*, 4 L. R. A. (N. S.) 306.

⁴"To picket the plaintiff's premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation," *Beck v. Teamsters' Union*, *supra*, p. 520—here the picketing was by groups of from five to twenty-five. So the collection of large crowds is held in itself intimidating in *Pope Motor Co. v. Keegan*, 150 Fed. 148 (1906), and *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155 (1906), per Sanborn, J., p. 181; and see *United States v. Kane*, 23 Fed. 748 (1885), per Brewer, J. Where a crowd of strikers is collected around a non-union employé, it is idle for one joining the crowd to say that his purpose is peaceable solicitation. "Neither the time nor the circumstances were such as to make an appeal possible," *Ideal Mfg. Co. v. Ludwig*, 149 Mich. 133 (1907).

In *Vegelehn v. Guntner*, 167 Mass. 92 (1896), strikers were enjoined from maintaining a picket of two men, while in *Jonas Glass Co. v. Association*, 77 N. J. Eq. 219 (1910), the injunction approved restrained the asso-

In *Mackall v. Ratchford* (C. C.) 82 Fed. 41, the defendants had joined a body of over 200 striking miners in marching with music and banners by one of the mines belonging to the complainant.⁵ The men marched and countermarched along the public highway for three days, early in the morning and again late at night when the men were coming off shift, and on each occasion the men taking part in the procession stopped on each side of the road where the miners must cross in going to and from the mine. The avowed object of the strikers was to induce the miners to join the strike. There were no threats and no loud, boisterous, or taunting language. The court found that the purpose was to intimidate the men, and thereby induce them to abandon their work, and secure their co-operation in closing the mines. It was held that the conduct of the defendants was intimidating and unlawful, and they were punished for violating the preliminary injunction.

IRON MOULDERS' UNION v. ALLIS-CHALMERS CO.

Circuit Court of Appeals, Seventh Circuit, 1908. 166 Fed. Rep. 45.

Appeal from the Circuit Court of the United States for the eastern district of Wisconsin; the appeal is from a decree in a strike injunction suit, the fifth clause of which enjoined the defendants, four Wisconsin local unions of the National Organization of Iron Moulders and some sixty individual members thereof "From congregating upon or about the company's premises or the sidewalk, streets, alleys or approaches adjoining or adjacent to or leading to said premises, and from picketing the said complainant's places of business or the homes or boarding houses or residences of the said complainant's employees."

BAKER, D. J. With respect to picketing as well as persuasion, we think the decree went beyond the line. The right to persuade new men to quit or decline employment is of little worth unless the strikers may ascertain who are the men that their late employer has persuaded or is attempting to persuade to accept employment. Under the name of persuasion, duress may be used; but it is duress, not persuasion, that should be restrained and punished. In the guise of picketing, strikers may obstruct and annoy the new men, and by insult and menacing attitude intimidate them as effectually as by physical assault. But from the evidence it can always be determined whether the efforts of the pickets are limited to getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgments. Prohibitions of

ciation "from loitering or picketing on the streets near the premises of the complainant with the intent to procure the personal molestation and annoyance of employees and persons willing to be employed."

⁵ See also *Sherry v. Perkins*, 147 Mass. 212 (1888), and *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. Cas. 551 (1868), strikers restrained from displaying intimidating banners and placards.

persuasion and picketing, as such, should not be included in the decree. *Karges Furniture Co. v. Amalgamated Wood Workers' Union*, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788; *Everett-Waddey Co. v. Typographical Union*, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792.¹

KARGES FURNITURE CO v. AMALGAMATED. ETC.,
UNION.

Supreme Court of Indiana, 1905. 165 Ind. 421.

"A resides in a populous, a residential part of the city. B has established a saloon in the same square. Keeping a saloon there is a lawful business. Many of the neighbors patronize the saloon, and the business prospers. A disapproves of the business in that place, and withholds his patronage. He has the absolute right to withhold it. The other neighbors have the absolute right to bestow theirs. B has no absolute right to the patronage of either, and without patronage will fail in business. Here it is plain that A has the absolute right to stand on the street corner and note all his neighbors who enter and leave the saloon, hail them on the street, or visit them at their respective homes, and by argument and persuasion (they being willing to listen)¹ endeavor to induce them to cease their patronage. A's object is to make B's business unprofitable and losing, and thus compel him to move away, and improve the peace and attractiveness of A's neighborhood. Now, if A converts all of his neighbors to his course of conduct by argument, reason, entreaty and other fair and proper means, and thereby effects the suppression of the saloon and financial ruin of B, it is *damnum absque injuria*. A has done nothing but what the law protects him in doing.²

¹"A union may appoint pickets or a committee to visit the vicinity of factories for the purpose of taking notes of the persons employed and to secure, if it can be done by lawful means, their names and places of residence for the purpose of peaceable visitation."—Hadley, J. in *Karges Furniture Co. v. Woodworkers' Union*, 165 Ind. 421 (1905), p. 431; *Searle Mfg. Co. v. Terry*, 106 N. Y. S. 438 (1905). See also Angellotti and Sloss, JJ., in *Pierce v. Stablemen's Union*, 156 Cal. 70 (1909); and see McPherson, J. in *Union Pacific R. Co. v. Ruef*, 120 Fed. 102 (1902), p. 114, and *Rogers v. Evarts*, 17 N. Y. S. 264 (1891).

²See the 3rd clause of the decree affirmed in *Frank v. Herold*, 63 N. J. Eq. 443 (1902).

³Compare Sherman, V. C. in *Booth v. Burgess*, 72 N. J. Eq. 181 (1906).

So long as the conduct of the defendants, whether an association or an individual, does not go beyond merely giving to its members or other persons having like business interests, information of conduct on the plaintiff's part which it or he regards as injurious to such interests, or is coupled with appeals to the common interests of such persons or advise them to cease dealing with the plaintiff, there is no liability, *Ulery v. Chicago Live Stock Ex.*, 54 Ill. App. 233 (1894); *Shinola Co. v. House of Krieg*, 133 N. Y. S. 1015 (1912); *contra*, *Olive & Sternenberg v. Van Patten*, 7 Tex. Civ. App. 630 (1894); and compare *Huskie v. Griffin*, *post*, or where union workmen appeal to the class feeling of non-union workmen to join a strike, *Vann, J. in National Protective Association of Steam Fitters v. Cumming*, 170 N. Y. 315 (1902), western case, or where employers furnish

2. For inducing the breach of contracts.

GLAMORGAN COAL CO. *v.* SOUTH WALES MINERS' FEDERATION.

In the Court of Appeal, 1903. L. R. 1903, 2 K. B. Div. 545.

The Glamorgan Coal Company, Limited, and seventy-three other plaintiffs, owners of collieries in South Wales, brought this action against the South Wales Miners' Federation, its trustees and officers, and several members of its executive council, claiming damages for wrongfully and maliciously procuring and inducing workmen in the collieries to break their contracts of service with the plaintiffs, and alternatively for wrongfully and maliciously conspiring to do so. The wages were paid upon a sliding scale agreement rising and falling with the price of coal. In November, 1900, the council of the federation, fearing that the action of merchants and middlemen would reduce the price of coal and consequently the rate of wages, resolved to order a "stop-day" on November 9, and informed the workmen. This order was obeyed by over 100,000 men, who took a holiday and thereby broke their contracts of service. At a conference held on November 12, between delegates of the men and the council, a resolution was passed authorizing the council to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally. In October and November, 1901, the council (as Bigham J. found) ordered four stop-days for the same reason as before, and the men took a holiday on each of those days in breach of their contracts. Bigham J. found that the action of the federation was dictated by an honest desire to forward the interest of the workmen and was not in any sense prompted by a wish to injure the masters, between whom and the men there was no quarrel or ill-will; that having been requested by the men by the resolution of November 12, 1900, to advise and direct them as to when to stop work, the federation and its officers did to the best of their ability, advise and direct the men honestly and without malice of any kind against the plaintiffs, and therefore had lawful justification or excuse for what they did.

VAUGHAN WILLIAMS, L. J. In the present case the *prima facie* actionable wrong is the interference with the contractual rights of the plaintiffs, and the question is whether there is such sufficient

to others in the same trade the names of strikers, *Wabash R. Co. v. Young*, 162 Ind. 102 (1903); *Bradley v. Pierson*, 148 Pa. St. 502 (1892); *Rhodes v. Granby Cotton Mills*, 87 S. Car. 18 (1910), and see *Baker v. Metropolitan Life Ins. Co.*, 64 S. W. 913 (Ky. 1901), and *Trimble v. Prudential Life Ins. Co.*, 64 S. W. 915 (Ky. 1901), holding that the prior agreement, not to employ or to discharge persons of the plaintiff's class, being void as against public policy and so not obligatory upon them, his discharge in obedience thereto was his employer's voluntary act. See also, *Rogers v. Evarts*, 17 N. Y. S. 264 (1891), holding that a newspaper could not be restrained from appealing to the public to support a strike.

justification for the defendants' interference as to exclude an action for procuring a breach of contract or for conspiracy. To say that the means employed by the defendants were illegal, because of the breach of contract, seems to me to be arguing in a circle; and I dissent from the contention of the appellants, that just cause for interference is excluded in cases where the advice actually given is to break a contract, and in consequence the contract is broken. It seems to me in the result that the only question in this case is whether the interference of the defendants was justified, and not whether the men individually could justify the breaches of contract, which of course they could not. I doubt very much whether an action would have lain against the aggregation of individual men for procuring the several breaches of contract, because I think there is a good deal to be said for the proposition that the community of interest of all these men following the same occupation in the South Wales coal fields entitled them to confer and act in concert, without rendering themselves liable to actions for procuring breaches of contract by one another or for conspiracy. But the case is very much complicated by the existence of the federation, which, according to the decision in the Taff Vale Case, (1901) A. C. 426, is a thing which can own property, which can employ servants, and which can inflict injury, to which the Legislature has impliedly given the power to sue, and on which the Legislature has imposed the liability to be sued for injuries purposely done by its authority and procurement. I do not think that such a body is entitled to rely upon a defence based on its absolute identity with the aggregate of individual members who happen to constitute the union. If such absolute identity existed it would follow that the union would be responsible for the aggregate damages resulting from the aggregate breaches of contract, and no action for procuring breaches of contract, or for conspiracy, would be necessary. * * * The federation and the members of their council, who are defendants, seek to base this justification on the suggestion that their relation to the men raises a duty on their part to advise the men, or, at all events, negatives their being mere meddlers. It was argued before us that the defendants were not mere advisers, but that they were actors who did the very thing complained of, in that they issued the notices ordering the stop-days, and compelled reluctant men to break their contracts by staying away from work without giving proper notices to their employers, and that the view of the federation was that men who refused to stay away would be guilty of disloyalty to the federation; but this argument does not convince me that the federation were not acting as advisers, nor does the fact that the federation actually issued the notices deprive the defendants of their character of advisers. It is not suggested in this case that the men stayed away from work under threats, intimidation, or physical compulsion. I think, therefore, the judgment of Bigham, J. must be affirmed for the reasons given by him.

ROMER, L. J. The law applicable to this case is, I think, well settled. I need only refer to two passages in which the law is shortly

and comprehensively stated. In *Quinn v. Leathen*, (1901) A. C. 495, at p. 510, Lord Macnaghten said: "A violation of legal right committed knowingly, is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."¹ And in the *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q. B. D. 598, at p. 614, Bowen, L. J. included in what is forbidden "the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it." But although, in my judgment, there is no doubt as to the law, yet I fully recognize that considerable difficulties may arise in applying it to the circumstances of any particular case. When a person has knowingly procured another to break his contract, it may be difficult under the circumstances to say whether or not there was "sufficient justification or just cause" for his act. I think it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is "sufficient justification," and most attempts to do so would probably be mischievous. I certainly shall not make the attempt. In my opinion, a defendant sued for knowingly procuring such a breach, is not justified of necessity merely by his showing that he had no personal animus against the employer, or that it was to the advantage or interest of both the defendant and the workman that the contract should be broken. I take the following simple case to illustrate my view. If A. wants to get a specially good workman, who is under contract with B., as A. knows, and A. gets the workman to break his contract to B.'s injury by giving him higher wages, it would not, in my opinion, afford A. a defence to an action against him by B. that he could establish he had no personal animus against B., and that it was both to the interest of himself and of the workman that the contract with B. should be broken. I think that the principle involved in this simple case, taken by me by way of illustration, really governs the present case. For it is to be remembered that what A. has to justify is his action, not as between him and the workman, but as regards the employer B. And, if I proceed to apply the law I have stated to the circumstances of the present case, what do I find? On the findings of fact it is to my mind clear that the defendants, the federation, procured the men to break their contracts with the plaintiffs—so that I need not consider how the question would have stood if what the federation had done had been merely to advise the men, or if the men, after taking advice, had arranged between themselves to break their contracts, and the federation had merely notified the men's intentions to the plaintiffs. The federation did more than advise. They acted, and by their agents actually procured the men to leave their work and break their contracts. In short, it was the federation who caused the injury to the plaintiffs. Now the justification urged is that it was

¹ If there be no lawful justification, it is not necessary that the defendant's conduct should be actuated by ill will or hatred of the plaintiff or by a desire to injure him, *Holder v. Cannon Mfg. Co.*, 135 N. Car. 392 (1904); *Tubular Rivet & Stud Co. v. Exeter Boot Co.*, 159 Fed. 824 (1908).

thought, and I will assume for this purpose rightly thought, to be in the interest of the men that they should leave their work in order to keep up the price of coal on which the amount of wages of the men depended. As to this, I can only say that to my mind the ground alleged affords no justification for the conduct of the federation towards the employers; for, as I have already pointed out, the absence on the part of the federation of any malicious intention to injure the employers in itself affords no sufficient justification. But it was said that the federation had a duty towards the men which justified them in doing what they did. For myself I cannot see that they had any duty which in any way compelled them to act, or justified them in acting, as they did towards the plaintiffs. And the fact that the men and the federation, as being interested in or acting for the benefit of the men, were both interested in keeping up prices, and so in breaking the contracts, affords in itself no sufficient justification for the action of the federation as against the plaintiffs, as I have already pointed out. I think, therefore, that the appeal must succeed.

LORD MACNAGHTEN. It was argued—and that was the only argument—that although the thing done was *prima facie* an actionable wrong, it was justifiable under the circumstances. That there may be a justification for that which in itself is an actionable wrong, I do not for a moment doubt. But what is the alleged justification in the present case? It was said that the council—the executive of the federation—had a duty cast upon them to protect the interests of the members of the union, and that they could not be made legally responsible for the consequences of their action if they acted honestly in good faith and without any sinister or indirect motive. The case was argued with equal candour and ability. But it seems to me that the argument may be disposed of by two simple questions. How was the duty created? What, in fact, was the alleged duty? The alleged duty was created by the members of the union themselves, who elected or appointed the officials of the union to guide and direct their action; and then it was contended that the body to whom the members of the union have thus committed their individual freedom of action are not responsible for what they do if they act according to their honest judgment in furtherance of what they consider to be the interest of their constituents. It seems to me that if that plea were admitted there would be an end of all responsibility. It would be idle to sue the workmen, the individual wrongdoers, even if it were practicable to do so. Their counsellors and protectors, the real authors of the mischief, would be safe from legal proceedings. The only other question is, What is the alleged duty set up by the federation? I do not think that it can be better described than it was by Mr. Lush. It comes to this—it is the duty on all proper occasions, of which the federation or their officials are to be the sole judges, to counsel and procure a breach of duty.

I agree with Romer and Stirling, L. J. J., and I think the appeal must be dismissed.

The appellants' counsel did not deny that, in his view of the

case, the defendants' conduct required justification, and it was contended (1) that all which the officials did was to advise the men, and (2) that the officials owed a duty to the men to advise and assist them as they did.

As regards advice, it is not necessary to consider when, if ever, mere advice to do an unlawful act is actionable when the advice is not libellous or slanderous. Nor is it necessary to consider those cases in which a person, whose rights will be violated if a contract is performed, is justified in endeavoring to procure a breach of such contract. Nor is it necessary to consider what a parent or guardian may do to protect his child or ward. That there are cases in which it is not actionable to exhort a person to break a contract may be admitted; and it is very difficult to draw a sharp line separating all such cases from all others.² But the so-called advice here was much more than counsel; it was accompanied by orders to stop, which could not be disobeyed with impunity. A refusal to stop work as ordered would have been regarded as disloyal to the federation. This is plain from the speeches given in evidence on the trial; and in my opinion it is a very important element in the case which cannot be ignored.

As regards duty, the question immediately arises—duty to do what? The defendants have to justify a particular line of conduct, which was wrongful, *i. e.*, aiding and abetting the men in doing what both the men and the officials knew was legally wrong. The constitution of the union may have rendered it the duty of the officials to advise the men what could be legally done to protect their own interests; but a legal duty to do what is illegal and known so to be is a contradiction in terms. A similar argument was urged without success in the case of Friendly Society of Stonemasons already referred to.

Then your Lordships were invited to say that there was a moral or social duty on the part of the officials to do what they did, and that, as they acted bona fide in the interest of the men and without any ill-will to the employers, there conduct was justifiable; and your Lordships were asked to treat this case as if it were like a case of libel or slander on a privileged occasion. My Lords, this contention was not based on authority, and its only merits are its novelty and ingenuity. The analogy is, in my opinion, misleading, and to give effect to this contention would be to legislate and introduce an entirely new law, and not to expound the law as it is at present. It would be to render many acts lawful which, as the law stands, are clearly unlawful.

My Lords, I have purposely abstained from using the word "malice." Bearing in mind that malice may or may not be used to

²In *Legriss v. Marcotte*, 129 Ill. App. 67 (1906), it was held that no action lay against the mother of a pupil of a convent school for inducing the mother superior to dismiss the plaintiff, a pupil therein, in breach of her contract with the plaintiff's mother, by statements untrue but honestly believed by the defendant that the plaintiff's father suffered from a loathsome, contagious disease which the defendant feared that the plaintiff might communicate to the other pupils.

denote ill-will, and that in legal language presumptive or implied malice is distinguishable from express malice, it conduces to clearness in discussing such cases as these to drop the word "malice" altogether, and to substitute for it the meaning which is really intended to be conveyed by it. Its use may be necessary in drawing indictments; but when all that is meant by malice is an intention to commit an unlawful act without reference to spite or ill-feeling, it is better to drop the word malice and so avoid all misunderstanding.

This appeal ought to be dismissed with costs.*

3. For the use of economic power as a means of compulsion.

(a) Conflicting interests of employer and employed.

1. The right to strike.

KEMP v. DIVISION NO. 241.

Supreme Court of Illinois, 1912. 255 Ill. 213.

MR. JUSTICE COOKE. The question presented for our determination is, whether a court of equity is authorized, upon application by the non-union employees, to restrain the union and its officers from calling a strike of the union employees in accordance with the vote previously taken by the union employees as members of the union, where the purpose of the proposed strike is to compel the

* *Accord: Brauch v. Roth*, 10 Ont. L. R. 284 (1904); *Cotter v. Osborne*, 18 Manitoba L. R. 471 (1909).

Even though a strike is justifiable as being to better the work conditions of the strikers, the inducing of either an employee to break his contract of employment or a customer to break his contract with the employer is an illegal means of carrying it on, *Jersey City Printing Co. v. Cassidy*, *post*; *Jonas Glass Co. v. Glass Blowers' Assn.*, 77 N. J. Eq. 219 (1910); *Flaccus v. Smith*, 199 Pa. St. 128 (1901), and see *Thomas v. Cincinnati, N. O. & T. P. R. Co.*, 62 Fed. 803 (1894), and a strike to compel the discharge of an employee working under a binding contract of employment is unlawful no matter how great the advantage which would accrue to the strikers from his discharge, *Read v. Friendly Society, etc.*, L. R. 1902, 2 K. B. 732.

Nor will trade competition justify the procurement of breaches of contract with a trade rival, *Doremus v. Hennessy*, 176 Ill. 608 (1898); *Beekman v. Marsters*, 195 Mass. 205 (1907), defendant persuaded a hotel company, which had by contract given the sole agency for booking accommodations therein to the plaintiff, that it had been unwise in so doing and induced it to give him the same rights as the plaintiff. It was said that "no case has been cited which holds that the right to compete justifies a defendant in intentionally inducing a third person to take away from the plaintiff his contractual rights."

See also, *Tubular Rivet & Stud Co. v. Exeter Boot Co.*, 159 Fed. 824

employer to discharge the non-union employees who are engaged in the same class of work.¹

In order to decide this question in the affirmative it would be necessary to hold that had the threatened act been completed, appellees would have been entitled to maintain an action for damages against the union and its officers for accomplishing their discharge from the service of the Railways Company, and that such action at law would not afford an adequate remedy because of the financial inability of appellants to respond in adequate damages for the injuries which appellees would suffer by reason of their discharge. The inadequacy of the remedy at law sufficiently appears from the bill, and it will only be necessary to determine whether the appellees would have been entitled to maintain the action for damages had their discharge been accomplished by appellants.

That the appellees would sustain damages if discharged by the Railways Company, and that such discharge and consequent damages would be occasioned by the acts of the appellants, acting for and on behalf of the union employees, clearly appears from the bill. The mere fact that one person sustains damage by reason of some act of another is not, however, sufficient to render the latter liable to an action by the former for such damage, but it must further appear that the act which occasioned the damage was a wrongful act and not performed in the exercise of a legal right, otherwise it is *damnum absque injuria*.

Every employee has a right to protection in his employment from the wrongful and malicious interference of another resulting in damage to the employee, but if such interference is but the consequence of the exercise of some legal right by another it is not wrongful, and cannot, therefore, be made the basis for an action to recover the consequent damages. It is the right of every workman, for any reason which may seem sufficient to him, or for no reason, to quit the service of another, unless bound by contract. This right cannot be abridged or taken away by any act of the legislature, nor is it subject to any control of the courts, it being guaranteed to every person under the jurisdiction of our government by the thirteenth amendment to the Federal constitution, which declares that involuntary servitude, except as a punishment for crime, shall not exist within the United States or any place subject to their jurisdiction. Incident to this constitutional right is the right of every workman to refuse to work with any co-employee who is, for any rea-

(C. C. A. 1st Circ. 1908), where the plaintiff, having had a dispute with the defendant, who had previously sold him machinery, over a twenty-five cent freight charge, the defendant notified another manufacturer, with whom it had an agreement for mutual protection from insolvent customers and who had sold machinery to the plaintiff, that the latter owed it an unpaid bill, whereupon the latter refused to deliver the machinery.

¹ It appears from the plaintiff's bill that the plaintiffs, who had been members of the union, having become dissatisfied with the manner in which its funds had been expended had resigned therefrom. The vote of the Union declared, that its members would "cease to work with men who after receiving benefits through our organization refuse to continue members."

son, objectionable to him, provided his refusal does not violate his contract with his employer; and there is no more foundation for the contention that the employee commits an actionable wrong by informing the employer, before he leaves the service, that he will not work with the objectionable co-employee, and thereby occasioning his discharge, than there would be for the contention that the employee would commit an actionable wrong by quitting the service and afterward stating to the employer his reason therefore, if, as a result thereof, the employer should choose to discharge the objectionable co-employee. In either case the employee is exercising a legal right, and although it results in damage to the objectionable co-employee, the latter has no cause of action against the former for causing his discharge. In the case at bar, had the union employees, as individuals and without any pre-arranged concert of action, each informed the Railways Company that they would no longer work with the appellees because appellees were not members of the union, and had appellees, in consequence thereof, been discharged because the Railways Company chose to retain the services of the union employees, appellees would have had no cause of action against the union employees for thus causing their discharge. Does the fact that the union, its officers and committees, acted as an intermediary between the union employees and the Railways Company, and under the circumstances and for the purposes disclosed by the bill, render unlawful the action by it, or them, which would have been lawful if performed by the union employees individually?

Labor unions have long since been recognized by the courts of this country as a legitimate part of the industrial system of this nation.

The purpose of organizing labor unions is to enable those employees who become members to negotiate matters arising between them and their employers through the intermediation of officers and committees of the union and to accomplish their ends through concerted action. If duly authorized by the employees to adjust any controversy arising between them and their employer, the union, its officers and committees are merely acting as agents of the employees in the matter. The demand that appellees be discharged, and the threat that unless the Railways Company complied with the demand the members of the union would call a strike of the employees of the Railways Company, in effect meant no more than the mere statement that the union employees of the Railways Company would no longer work with the non-union employees, and if the Railways Company chose to retain in its employ the non-union men the union employees would quit the service of the Railways Company.

No contract rights being involved, the union employees had a right to quit the service of the Railways Company, either singly or in a body, for any reason they chose or for no reason at all. If the only purpose of the union employees was to quit the service and permanently sever their connections with their employer, appellees would in nowise be damaged and could have no grounds for injunctive relief. The bill discloses, however, that this was not the

only purpose of the members of the union. They did not propose absolutely to sever their connection with their employer, but by means of a strike to withdraw temporarily their services, and then, by such means as might be proper and permissible, seek to induce their employer to accede to their demands and reinstate them in the service under the conditions they sought to impose. By thus combining it becomes necessary to inquire whether the purpose of the combination was a lawful one.

While it cannot be successfully contended that every strike is lawful, it is generally conceded by our courts that workmen may quit in a body, or strike, in order to maintain wages, secure advancement in wages, procure shorter hours of employment or attain any other legitimate object.

No threats are made and no violence is threatened. The members of the union have simply said to their employer that they will not longer work with men who are not members of their organization, and that they will withdraw from their employment and use such proper means as they may to secure employment under the desired conditions.

It is insisted that a strike is lawful only in a case of direct competition, and as it cannot be said that the union employees are in any sense competing with appellees, their acts cannot be justified. It is true, as has been stated, that the proposed strike was not to be called for the direct purpose of securing better wages or shorter hours or to prevent a reduction of wages, any one of which would have been a proper object. The motive was more remote than that, but it was kindred to it. The purpose was to strengthen and preserve the organization itself. Without organization the workmen would be utterly unable to make a successful effort to maintain or increase their wages or to enforce such demands as have been held to be proper. The following view expressed by Mr. Chief Justice Holmes in his dissenting opinion in *Plant v. Woods*, 176 Mass. 492, in discussing facts similar to those here involved, is in our opinion a correct statement of the law and is applicable here: "That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendant's society as a preliminary means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest."

If it is proper for workmen to organize themselves into such combinations as labor unions, it must necessarily follow that it is proper for them to adopt any proper means to preserve that organization. If the securing of the closed shop is deemed by the members of a labor union of the utmost importance and necessary for the preservation of their organization, through which, alone, they have

been enabled to secure better wages and better working conditions, and if to secure that is the primary object of the threat to strike, even though in the successful prosecution of the object of the combination injury may result incidentally to non-union men through the loss of their positions, that object does not become unlawful. It is apparent that in this case the sole purpose was to insure employment by the Railways Company of union men, only. The appellees had the right to retain their membership in the union or not, as they saw fit. On the other hand, if the members of the union honestly believed that it was to their best interests to be engaged in the same employment with union men only, and that it was a detriment and a menace to their organization to associate in the same employment with non-members, it was their right to inform the common employer that they would withdraw from its service and strike unless members of the union, only, were employed, even though an acquiescence in their demands would incidentally result in the loss of employment on the part of the non-union men. It was only incumbent upon them to act in a peaceful and lawful manner in carrying out their plans.²

The cases of *Doremus v. Hennessy*, 176 Ill. 608, and *Wilson v. Hey*, 232 id. 389, also relied upon by appellees, and the case of *Purington v. Hinchliff*, 219 id. 159, were all boycott cases.³

The primary object of a boycott being to inflict injury upon

²"In *Gillespie v. People*, 188 Ill. 176, a statute making it a misdemeanor for an employer to prevent an employee, by threats, from joining a labor organization, or to discharge an employee because of membership in a labor organization, was held to be unconstitutional, and the right of an employer to discharge his employee solely because he would not resign from his union was upheld. That employes might suffer by remaining members of their unions, or that they might through necessity be compelled to disband the organizations they had built up and maintained for their own proper benefit, could not affect the right of the employer. He has the right to manage his business as he sees fit. It would seem that labor organizations should be accorded the same right to manage their affairs and to determine what is best for their own interests. To deny them the right to determine whether their best interests required that they should be associated in their work only with members of their organization would imperil their very existence. If they have the right to make such a requirement, then when their employer procures non-union labor they have the right to strike to enforce that requirement, as that is the only peaceable method available to compel an adjustment of their controversies and to preserve the integrity of their organizations. From the facts as disclosed by the bill it can only be said that the members of the union, upon deliberation, concluded that their own welfare and business interests required that they cease working with those who were not members of their organization. This being their primary object, they have the right to quit the employment and go upon a strike and to use all proper means to secure their reinstatement upon the conditions desired."

³The case of *Barnes v. Typographical Union*, 232 Ill. 424 (1908), is discussed and stated to be a case similar to *O'Brien v. People*, 216 Ill. 354 (1905), and *Franklin Union v. People*, 220 Ill. 355 (1906), in that the injunction violated in the two latter and asked in the former, was against picketing and other unlawful acts and so the statements condemning peaceful strikes for a "closed shop" were *dicta*, but the dissenting opinion of Scott and Farmer, JJ., seems to indicate that they at least believed that the injunction affirmed was sufficiently broad to cover peaceable persuasion.

another, has universally been held to be illegal. Here the primary object of the combination is to further the interests of the organization and improve and better the condition of its members. Whatever injury may follow to others is merely incidental.

The judgment of the Appellate Court is reversed and the decree of the circuit court is affirmed.

Judgment reversed.

MR. JUSTICE CARTER, specially concurring:

The intentional infliction of damage is a tort out of which an action may arise unless there is just cause for inflicting the damage.

The difficulty, especially in labor disputes, arises in applying them, in order to decide whether there was just cause for inflicting the damage.

It is difficult to conceive of a strike without damage to the parties involved in the dispute. The employees intend to deprive the employers of their labor and prevent them from getting others to take their places. They intentionally inflict harm as a means of compelling the employers to yield to their demands. The American and English authorities now all agree that employees have the same right as employers to combine for the legitimate advancement of their interests; that for the purpose of advancing the legitimate interests of the members of a labor union, and not for the purpose of oppressing or injuring others, they may strike or threaten to strike. This may be done to secure a raise in wages, shorter hours, better sanitary conditions, or any other lawful purpose the primary object of which is to benefit themselves. And this principle is enforced even though, as a natural incident thereto, damage is inflicted upon the employer. On these questions of the management and control, as well as the rights, of great combinations of capital and labor, the rights of the public "as a distinct entity" must be considered. (Bigelow on Centralization and the Law, 7; 20 Harvard Law Rev. 436.) Individual liberty must be subject to such restraint as the public interests may require, and when the two conflict the former must yield. *Adair v. United States*, 13 Ann. Cas. 764, and note; 208 U. S. 161.

In this case there is no question of violence, intimidation, unlawful coercion, threats or other unlawful methods, unless it can be said that a threat to strike if non-union men are not discharged is intimidation, as that term is used in this class of cases. The courts of Massachusetts have held that a strike for purposes similar to those shown in the allegations in the bill in this case was not lawful; that the officers and members of a labor union would be held in an action of tort for inducing an employer to discharge a workman because he did not belong to the union, (*Plant v. Woods, supra*; *Berry v. Donovan*, 188 Mass. 353); and that such a strike could be enjoined. (*Folsom v. Lewis*, 94 N. E. Rep. (Mass.) 316.)⁴ In other jurisdictions in this country the same general rule has been

⁴ See also, *Aberthaw Construction Co. v. Cameron*, 194 Mass. 208 (1907).

laid down as followed in Massachusetts. (See *Erdman v. Mitchell*, 207 Pa. St. 79; *Purvis v. United Brotherhood*, 214 Pa. St. 348; *Lucke v. Clothing Cutters*, 77 Md. 396; *Brennan v. United Hatters*, *supra*; *Perkins v. Pendleton*, 90 Me. 166; *Everett-Waddey Co. v. Richmond Typographical Union*, 105 Va. 188; *Beck v. Teamsters' Protective Union*, 118 Mich. 497; 1 Eddy on Combinations, sec. 517.)⁵

Other courts have upheld the contention of appellants on the question under consideration. In *National Protective Ass'n v. Cumming*, 170 N. Y. 315, it was held that a labor union might refuse to permit its members to work with fellow-servants who were members of a rival organization, and might notify the employers to that effect and that a strike would be ordered unless such fellow-servants were discharged; that even though the employers objected to the discharge, neither they nor the organization of which they were members would have a right of action against the labor union or its members. In *Gray v. Building Trades Council*, 91 Minn. 171, the court stated that the authorities very generally held that the members of a labor union may, singly or in a body, quit the services of their employer, and for the purpose of strengthening their association may persuade and induce others in the same occupation to join their union, and as a means to that end may refuse to allow their members to work in places where non-union labor is employed. In *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, the court said (p. 762): "Union workmen who inform their employer that they will strike if he refuses to discharge all non-union workmen in his employ are acting within their absolute right, and, in fact, are merely dictating the terms upon which they will be employed."⁶ The reasoning in this case was approved in *Booth Bros. v. Burgess*, 72 N. J. Eq. 181. To the same effect is *Allis-Chalmers Co. v. Iron Moulders' Union*, 150 Fed. Rep. 155. (18 Am. & Eng. Ency. of Law,—2d ed.—84; see, also, *Clothing Co. v. Watson*, 168 Mo. 133; Cooke on Combinations, sec. 60; *State v. Van Pelt*, 136 N. C. 633; *Parkinson v. Building Trades Council*, 154 Cal. 581; 18 Law Quarterly Rev. 1.)

⁵"Some of these cases do not strictly bear on the question here under discussion. In *Erdman v. Mitchell*, *supra*, the injunction issued was sustained on the ground, among others, that it was sought by the defendants to prevent the complainant from securing employment "with any other employer whatsoever." In *Lucke v. Clothing Cutters*, *supra*, certain non-union employees sought admission to the union and were refused without any apparent reason. That case and *Beck v. Teamsters' Union*, *supra*, also involved violence. In *Plant v. Woods*, *supra*, there was a contest between two rival labor unions of the same craft; at the time that the threat was made to strike if certain persons were not discharged it was intimated also that the employer, if he refused, "might expect trouble in his business." The opinion held that this last statement meant more than that the strikers would cease to work." See also accord with the cases cited, *Martell v. Victorian Miners' Association*, 29 Vict. L. R. 475 (1903), and *Barnes & Co. v. Berry*, 156 Fed. 72 (1907).

⁶But see *Ruddy v. United Association of Journeymen & Plumbers*, 75 Atl. 742 (S. C. of N. J. Chancery, 1910).

As heretofore stated that highest court of Massachusetts has upheld the contention of appellees. That court has also made rulings on kindred questions which tend quite strongly to uphold the conclusion reached in *National Protective Ass'n v. Cumming*, *supra*. In *Pickett v. Walsh*, *supra*, it was held that a strike by the members of a bricklayers' and stonemasons' union in refusing to lay bricks or stone in the construction of a certain building unless also employed to do the pointing of the mortar and unless other persons not bricklayers or stonemasons were discharged, did not entitle the latter persons, when discharged by the contractor, to maintain a suit in equity to enjoin the acts of the members of the union.⁷

To hold that a labor organization has a right to strike because the members want the work other people are doing, and cannot be enjoined for so striking, does not seem to differ very materially, in principle, from the holding that a labor organization can strike because certain fellow-laborers will not join the union. The result of the latter strike, if successful, will be to give the work of the non-union men to the union men. It would appear, also to be drawing a very fine distinction to hold that the primary object of a strike in such a case, was to aid the members of the labor union, while in the case now under consideration the primary object was not to help the members.

The law concerning the right to labor or cease to labor for an employer applies to a single person or a combination of persons. If the members of a labor organization do not wish to work for the same employer with one or more other persons, they certainly have the right, under all authorities, to quit peaceably. Shall the courts hold employees liable in an action for damages because they refuse, on account of religious or race questions, to work with other employees? Religious or race prejudice might be held to be based on arbitrary whim or caprice, without any reasonable basis of benefit to the competing workmen. The most that has ever been said by the courts in support of the contention of appellees is, that the refusal to work with non-union men, while it might strengthen the labor organization, was a result too remote from the controversy between the employer and employees to be considered such a direct benefit to the latter as to justify a strike on that account. Here we have co-equal rights in conflict,—the right of certain persons to be free to remain in their employment without interference, and the right of the members of the labor union to quit their employment for good cause or no cause at all. In the majority of cases the primary purpose of the strike is not to injure the non-union workmen but to benefit organized labor. (18 Harvard Law Rev. 418, note 3.) Clearly, in this case the strike was not malevolent,—that is, on ac-

⁷ He also cites and criticizes *Minasian v. Osborne*, *post*. See also, the dissenting opinion of Knowlton, J., in *Reynolds v. Davis*, 198 Mass. 294 (1908), p. 301, intimating that a strike for a closed shop, where its object is solely to obtain a monopoly of the labor supply and so be in a position to bargain advantageously at some future time for better work conditions, is illegal.

count of ill-feeling toward the non-union workmen as individuals or primarily from a desire to injure them,—because the union workmen requested and demanded that the non-union workmen, who had formerly belonged to the union, be required to join the union or else be discharged.

While it is sometimes argued that there may be a right to strike when, under certain circumstances, a threat to strike would be unlawful, (20 Harvard Law Rev. 268,) on reason and authority the members of a labor organization have the legal right peaceably to threaten to do that which they may lawfully do. *National Protective Association v. Cumming*, *supra*; *National Fireproofing Co. v. Mason Builders*, 169 Fed. Rep. 259; *Park & Sons Co. v. National Druggists' Ass'n*, 175 N. Y. 1.⁸

In my judgment union workmen not bound by contract who inform their employer that they will strike unless he discharges non-union workmen in the same line of employment should be held to be merely dictating the terms of their own employment; that it is not unlawful for members of a labor union to seek by peaceful methods to induce those engaged in the same occupation to become members of such union, and as a means to that end to refuse to allow union laborers to work in the same line of employment in a place where non-union laborers are employed. The proposed purpose of the strike not being unlawful it necessarily follows that an injunction should not issue as prayed for in the bill.

CARTWRIGHT, J., DUNN, C. J., and HAND, J.: The rights and duties of employer and employee, or their relation to each other, have no connection with this case. The right asserted by appellees to be free from interference by appellants is not a right which in-

⁸ See *accord*: Parker, C. J., in *National Protective Assn. v. Cumming*, 170 N. Y. 315 (1902), p. 329, "The defendant associations had the absolute right to threaten to do what they had the right to do"; and see *Heywood v. Tillson*, 75 Maine 225 (1883), per Peter, J., p. 239, and Appleton, C. J., p. 234. *Contra*, Freeman, J., dissenting in *Payne v. Western, etc., R. Co.*, 13 Lea 507 (Tenn. 1884), holding that while a man may discharge an employee at will "without any reason assigned" he may not "hold the threat" (of discharge) over the employe "in terrorem to fetter the freedom of the employee, for the purpose of injuring an obnoxious person"; and see the very valuable discussion of the matter by Professor Jeremiah Smith, *Crucial Issues in Labor Legislation*, 20 Harv. L. R., pp. 269 to 273, in which it is said that the view above expressed in the principal case is open to the objection, *inter alia*, that "it overlooks the distinction between unconditionally exercising a right and offering to exercise it (or refrain from exercising it) on condition that the offeree shall take action which is intended to produce (and does produce) damage to a third person." A similar distinction is recognized in other branches of the law. So one is legally free to prosecute or not to prosecute a thief who has stolen his goods, but if he threatens to prosecute the thief unless he return the goods and on their return he then does not prosecute, he is guilty of compounding a felony. So one, threatening another to tell the truth about him and obtaining money as the price of his silence, is guilty of blackmail, and see *Smith v. Bromley*, 2 Douglas 696 (1781), *Joannin v. Ogilvie*, 49 Minn. 564 (1892), and *Kilpatrick v. Germania Life Ins. Co.*, 183 N. Y. 163 (1905), where money obtained as the condition of doing something which the doer was legally free to do or not, as he pleased, was recovered back as money obtained by duress.

heres in the Railways Company and the question whether a strike would be a wrong to it is not involved. The bill is based on the ground that there would be no strike but that the appellees would be discharged. There is no reason to suppose that the threat would not be effective, and the question here is whether the appellants can be permitted to drive the appellees out of employment because they do not choose to belong to the union and contribute to a political party or other purposes of which they do not approve.

If it can be conceded that what one may lawfully do in pursuance of a legal right two or more may lawfully agree to do jointly, and the only difference is not in principle but in the consequences which may result from doing the act in combination, certainly no one can deny that if such an act as was threatened in this case could not lawfully be done by an individual it could not be done by a combination of numerous individuals constituting Division 241. The only difference would be that a single individual could not accomplish the injury, while a combination of 4,500 employees would be certain to procure the discharge of appellees.*

The question whether an individual can lawfully, for his own gain, procure the discharge of another from his employment was settled by this court in *London Guarantee Co. v. Horn*, 206 Ill. 493, in accordance with the principles declared in *Doremus v. Hennessy*. There is no possible ground of distinction between the rights which a corporation, within its chartered powers, may exercise and those enjoyed by individuals, and it was there held that such an act as was threatened in this case by the appellants is a wrongful and unlawful act, which will authorize a recovery of damages.

There have been a few cases adopting the view that because the simultaneous quitting or withdrawing from work of a body of workmen is not unlawful in itself as against the employer, it cannot become unlawful on account of a malicious motive to injure other workmen in the exercise of their right. The case of *Allen v. Flood*, App. Cas. 1, decided by the House of Lords, was generally interpreted as an example of that doctrine. It was there held that the appellant had violated no legal right of the laborers discharged, that no unlawful means were used to procure their discharge, and that appellant's conduct was not actionable, however malicious or bad the motive might have been.

The decision in *Allen v. Flood* has been qualified, explained, and, as generally understood, has been overruled in England. In *Quinn v. Leatham*, (1901) A. C. 495, its effect was explained away as being a case where there was no combination but only an act by the defendant expressing his own views, and as holding that as an act which does not amount to a legal injury cannot be actionable on account of a bad motive. In *Giblan v. National Amalgamated Laborers' Union*, (1903) 2 K. B. Div. 600, the secretary of a trade union notified the foreman of plaintiff's employer that other men

* See Romer, J., in *Giblan v. National Amalgamated Laborers' Union*, L. R. 1903, 2 K. B. 600.

would be called out on a strike unless the plaintiff was discharged. The object was to enforce payment of a debt due to the union, which would be an advantage to the union and increase its resources and be a benefit more direct and immediate than increasing membership, and it was held that the discharge of the plaintiff so procured was unlawful. The case of *National Protective Ass'n v. Cumming*, 170 N. Y. 315, was a contest between two rival labor organizations, one of which had been organized by a laborer who had failed to pass the examination required by the other organization. The qualifications and standard of admission of that organization were lower than those of the other, and the objection was to working with men not qualified according to the standard of the objecting organization. The court was divided, and a great deal was said in the majority opinion which had only remote connection with the question involved and which has not met with the approval of the courts or law writers generally. There is no question, here, of competency, fitness, danger to other employees, race, color, religion, or any other thing that would make association unpleasant or objectionable. The question in this case was not involved in that one, but the decision of the same court in *Curran v. Galen*, 152 N. Y. 33, was upon substantially the same question here in issue. That was the case of an individual laborer, and the court held that if the purpose of an organization was to coerce other workmen to become members under the penalty of loss of employment the purpose was unlawful.

The right of every laborer to dispose of his labor as he may choose for the support of himself and those dependent upon him is as sacred as the right to carry on any lawful business or any other right of the citizen. Governments and courts would be useless if they fail to protect the laborer in the enjoyment of such a right. It can only lawfully be interfered with by one in the exercise of an equal or superior right, and that is the ground upon which the right to obtain the place of another in direct and lawful competition is sustained. The right of a labor organization to enforce a closed shop for the mere purpose of strengthening the labor organization in future contests with the employer is not competition, and is not of the same character or equal to the right of the individual to dispose of his labor at his own will. There is not the slightest reason to suppose that the Railways Company would permit a strike to be called, with the consequent disastrous effects to its business, for the sake of retaining the appellees in its employment. They would undoubtedly be discharged, and the accomplishment of that result for the purpose of gaining the remote and indirect advantage to Division 241 would give a right of action to the appellees for the consequent damage. The case is therefore one where a court of equity ought to interpose to prevent the threatened danger, and in our opinion the judgment of the Appellate Court should be affirmed.

SCHWARCZ v. INTERNATIONAL LADIES' GARMENT
WORKERS' UNION

Supreme Court of New York, 1910. 124 N. Y. Supplement, 968.

GOFF, J. By its affirmance (in 198 N. Y. 587), of the decision of the Appellate Division in *McCord v. Thompson-Starrett Co.*, 129 App. Div. 130, 113 N. Y. Supp. 385, the Court of Appeals has declared that it is against the public policy of the state for employers who control practically the whole trade in a community to combine for the purpose of compelling workmen to join a particular union as a condition of employment. The result is a development of the doctrine enunciated in *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496, in which case the court said:

"Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workmen be to hamper or restrict that freedom and, through contracts or arrangements with the employers, to coerce other workmen to become members of the organization and to come under its rules and conditions under the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government, and the nature of our institutions."

This language was quoted with approval by Ingraham, J., in his dissenting opinion in the *McCord* Case, but his dissent was not on the law as expounded, but on the question of the power of the board of governors of defendant association to issue an order requiring its members not to employ workmen who refused to join. "Such an agreement," said the court in *Jacobs v. Cohen*, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, "when participated in by all or by a large proportion of employers, becomes oppressive and contrary to public policy, because it operates generally upon the craftsmen in the trade and imposes upon them as a penalty for refusing to join the favored union the practical impossibility of obtaining employment at their trade and thereby gaining a livelihood."

If the rule laid down in the *McCord* Case be the law, and it must be accepted as such, being the latest expression of the Court of Appeals, it must be applicable to workmen as well as to employers. It would be repugnant to reason to hold that it applies to one and not to the other. What the employers may not do the workmen may not do. If a combination of one to refuse employment except on condition of joining a union be against public policy, a combination of the other to cause refusal of employment except on condition of joining a union is alike against public policy. This refusal was sought to be caused by the demand of the defendant union made upon all the employers in the trade that the non-union men already employed should be discharged in two weeks unless they joined the union. A discharge under such circumstances would be a refusal

to employ. Appropriate here is the method of reasoning employed by Ward, J., in *Irving v. Joint District Council* (C. C.) 180 Fed. 896:

"To take the converse of the proposition. Will the defendants admit that employers may combine to prevent any employer from using union labor? May the employers agree not to sell to or contract with any one who deals with an employer who uses union labor? Either of these propositions is destructive of the right of free men to labor for or to employ the labor of any one the laborer or the employer wishes."

"Whatever one man may do alone," said Vann, J., in the *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 321, 338, 63 N. E. 369, 376, 58 L. R. A. 135, 88 Am. St. Rep. 648, "he may do in combination with others, provided they have no unlawful object in view," a proposition which was assumed to be correct by Parker, C. J., writing the prevailing opinion. That the purpose of a combination is material in considering its legality has been held in *Curran v. Galen*, *supra*; *Beattie v. Callanan*, 82 App. Div. 7, 81 N. Y. Supp. 413, and *Schlang v. Ladies' Waist Makers' Union*, 67 Misc. Rep. 221, 124 N. Y. Supp. 289.

That the purpose to be considered is its immediate, not its ulterior, purpose, was held in *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 631, 91 N. Y. Supp. 185. In *McCord v. Thompson-Starrett Co.*, *supra*, the illegal purpose of the combination to drive workmen into a particular union invalidated a bond given by one of its members to secure obedience to orders of the association. There may have been an ulterior purpose of the combination to protect its members against blackmail and extortion. That was a legal purpose, but did not validate the bond in suit.

The primary purpose of this suit is not to better the condition of the workmen, but is to deprive other men of the opportunity to exercise their right to work and to drive them from an industry in which, by labor, they may have acquired skill, and which they have a right to pursue to gain a livelihood, without being subjected to the doing of things which may be disagreeable or repugnant. That this is the motive which animates the combination of defendants is clear from the correspondence, the negotiations, the conferences, and the acts and conduct disclosed in papers before the court. At the conference, the manufacturers conceded all demands of the unions, except that they proposed to arbitrate the questions of wages and Saturday half holidays throughout the year and except that they refused to concede a closed shop. Their offer of arbitration was refused. Some 10 days after negotiations had been discontinued, counsel for the unions made a proposition to one of the manufacturers, looking towards a settlement of the whole controversy, as follows:

"The association is to obligate each of its members to employ union men as long as the union will be able to furnish union men who can do the work properly. Within two weeks the non-union men shall join the union. . . . I am certain an agreement will be reached on all other matters."

In insisting upon the closed shop it was doubtless the intention of the union to get the whip hand of the manufacturers by perfecting a powerful organization. That agency would thereafter insure respect for their demands for a continuance of the wages and hours which the manufacturers are now ready to concede, but here, as in the McCord Case, the ulterior purpose of the union is immaterial if the immediate purpose is unlawful. That it is unlawful has been shown.

The distinction between the present case and *National Protective Association v. Cumming*, *supra*, is twofold. In the National Protective Association Case there was no proof of illegal motive. It had not been found at Special Term and the Court of Appeals could not infer it, while here the motive is found to be illegal. It is distinguishable again in that there was no wide combination to drive non-union men out of their trade in a community. Here the combination is directed against every non-union man in the trade in the borough of Manhattan.¹

PICKETT v. WALSH.

Supreme Judicial Court of Massachusetts, 1906. 192 Mass. 572.

LORING, J. This suit in equity comes before us on an appeal from a final decree.

There seems to be three causes of action upheld by the decree.

Finally, the plaintiffs sought to be protected against a strike by the defendants in order to get the work of pointing for the members of their unions.¹

We are brought to the question of the legality of the strike in the case at bar, namely, a strike of bricklayers and masons to get the work of pointing, or, to put it more accurately, a combination by the defendants, who are bricklayers and masons, to refuse to lay bricks and stone where the pointing of them is given to others. The defendants in effect say we want the work of pointing the bricks and stone laid by us, and you must give us all or none of the work.

The case is one of competition between the defendant unions and the individual plaintiffs for the work of pointing. The work of pointing for which these two sets of workmen are competing is work which the contractors are obliged to have. One peculiarity of the case therefore is that the fight here is necessarily a triangular one. It necessarily involves the two sets of competing workmen and

¹ Compare also *Ruddy v. United Assn.*, 75 Atl. 742 (S. C. N. J. C. H. 1910) and *Graham v. Knott*, 14 Brit. Columbia, 97 (1908).

In many cases the court regards as important if not controlling the fact that the object of the defendants is to obtain a monopoly of the labor market or of the supply of the commodity dealt in, *Berry v. Donovan*, 188 Mass. 353 (1905), *Reynolds v. Davis*, 198 Mass. 294 (1908); and see *Brown & Allen v. Jacobs' Pharmacy*, *post*, and *Gatzow v. Buening*, cited in the notes thereto.

¹ Only so much of the opinion is given as concerns this, the third ground of action upon which the third clause of the decree was based.

the contractor, and is not confined to the two parties to the contract, as is the case where workmen strike to get better wages from their employer or other conditions which are better for them. In this respect the case is like *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598; S. C. on appeal (1892) A. C. 25.

The right which the defendant unions claim to exercise in carrying their point in the course of this competition is a trade advantage, namely, that they have labor which the contractors want, or, if you please, cannot get elsewhere; and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stone which they lay. It is somewhat like the advantage which the owner of back land has when he has bought the front lot. He is not bound to sell them separately.² To be sure the right of an individual owner to sell both or none is not decisive of the right of a labor union to combine to refuse to lay bricks or stone unless they are given the job of pointing the bricks laid by them. There are things which an individual can do which a combination of individuals cannot do. But having regard to the right on which the defendants' organization as a labor union rests, the correlative duty owed by it to others, and the limitation of the defendants' rights coming from the increased power of organization, we are of opinion that it was within the rights of these unions to compete for the work of doing the pointing and, in the exercise of their right of competition, to refuse to lay bricks and set stone unless they were given the work of pointing them when laid.

The result is harsh on the contractors, who prefer to give the work to the pointers because they get from the pointers better work with less liability at a smaller cost. Again, so far as the pointers (who cannot lay brick or stone) are concerned, the result is disastrous. But all that the labor unions have done is to say you must employ us for all the work or none of it. They have not said that if you employ the pointers you must pay us a fine, as they did in *Carew v. Rutherford*, 106 Mass. 1. They have not undertaken to forbid the contractors employing pointers, as they did in *Plant v. Woods*, 176 Mass. 492. So far as the labor unions are concerned the contractors can employ pointers if they choose, but if the contractors choose to give the work of pointing the bricks and stones to others the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful. The contractors doubtless would have liked it better if there had been no competition between the bricklayers' and masons' unions on the one hand and the individual pointers on the other hand. But there is competition. There

² See somewhat similar cases put by Brannon, J., in *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611 (1902), p. 619.

being competition, they prefer the course they have taken. They prefer to give all the work to the unions rather than get non-union men to lay bricks and stone to be pointed by the plaintiffs.

Further, the effect of complying with the labor unions' demands apparently will be the destruction of the plaintiffs' business. But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts. It was well said by Hammond, J. in *Martell v. White*, 185 Mass. 255, 260, in regard to the right of a citizen to pursue his business without interference by a combination to destroy it: "Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly."

We cannot say on the evidence that pointing is something foreign to the work of a bricklayer or a stonemason and therefore something which a union of bricklayers and stonemasons have no right to compete for or insist upon. On the contrary the evidence shows that in Boston the pointing is done to some extent by bricklayers and stonemasons, and there is no evidence that the trade of pointers exists outside that city.

The protest of the defendant unions against the plaintiffs being allowed to organize a pointers' union is not an act of oppression. It is not like the refusal of the union in *Quinn v. Leathem*, (1901) A. C. 495, to work with the non-union men or to admit the non-union men to their union. The defendants' unions are not shown to be unwilling to admit the plaintiffs to membership if they are qualified as bricklayers or stonemasons.⁸ But the difficulty is that the plaintiffs are not so qualified. They are not bricklayers or masons. The unions have a right to determine what kind of workmen shall compose the union, and to insist that pointing shall not be a separate trade so far as union work is concerned. They have not undertaken to say that the contractors shall not treat the two trades as distinct. What they insist upon is that if the contractors employ them they shall employ them to do both kinds of work.

The application of the right of the defendant unions, who are composed of bricklayers and stonemasons, to compete with the individual plaintiffs, who can do nothing but pointing (as we have said,) is in the case at bar disastrous to the pointers and hard on the contractors. But this is not the first case where the exercise of the right of competition ends in such a result. The case at bar is an instance where the evils which are or may be incident to competition bear very harshly on those interested, but in spite of such evils competition is necessary to the welfare of the community.

⁸ The evidence tended to show that their application for a charter for a "pointers" union was refused by the Boston Trade Council of the American Federation of Labor on the ground that pointing was properly a part of the bricklayers' and masons' trade and that one at least of the bricklayers' unions opposed the application.

It follows that the third clause of the decree must be stricken out.⁴

WILLCUTT & SONS CO. v. J. J. DRISCOLL

Supreme Judicial Court of Massachusetts, 1908. 200 Mass. 110.

HAMMOND, J. We are of opinion therefore that this strike must be regarded as simply a strike for higher wages and a shorter day. It was not merely a sympathetic strike, as in *Pickett v. Walsh*, 192 Mass. 572, 587, or one whose immediate object was only remotely connected with the ultimate object of the strikers, as in *Plant v. Woods*, 176 Mass. 492. It was a direct strike by the defendants against the other party to the dispute, instituted for the protection and furtherance of the interests of the defendants in matters in which both parties were directly interested and as to which each party had the right, within all lawful limits, to determine its own course. Such a strike must be treated as a justifiable strike so far as respects its ultimate object.

But however justifiable or even laudable may be the ultimate object of a strike, unlawful means must not be employed in carrying it on; and it is contended by the plaintiff that the use of fines and threats of fines, under the circumstances disclosed in the record, are unlawful.

The question how far the imposition of fines by an organization upon its members where the effect is to injure a third party is justifiable, was considered in this court in *Martell v. White*, 185 Mass. 255; and it was there adjudged that the imposition of such a fine by which members of the organization were coerced into refusing to trade with the plaintiff, not a member, to his great damage, was inconsistent with the ground upon which the right to competition in trade is based, and as against him was not justifiable.

That principle, if applicable to the facts of this case, is decisive. The majority of the court are of the opinion that it is applicable

⁴ In *Reynolds v. Davis*, 198 Mass. 294 (1908), Knowlton, J., in his dissenting opinion intimates that a strike for a closed shop is lawful if there is not work enough for all union men desiring employment, if non-union men are employed.

In *National Fireproofing Co. v. Mason Builders' Assn.*, 169 Fed. 259 (1909), an agreement was made between defendants, an association, which comprised a minority of the master builders of New York City, and the various bricklayers' unions, including practically all the bricklayers therein, that the master builders should not sub-let interior work, but should give preference in such work to the men employed on the walls and providing that no union man should be allowed to work for a builder not accepting these regulations, which, however, any builder, whether a member of the association or not, could accept. The plaintiff having obtained a contract under the George Fuller Co. to do the fireproofing in a certain building, the defendants notified them of the above regulations and then struck work, thus forcing the plaintiff to cancel his contract. It was held that the object of these provisions was to advance the interests of the defendant bricklayers and not solely to injure the plaintiff, and that they had the right to enforce obedience thereto by strike.

and hence that there should be a decree for the plaintiff enjoining intimidation or coercion by fines.

Under ordinary circumstances this opinion would end here. But inasmuch as a minority of the court still think that the principle laid down in *Martell v. White*, with reference to intimidation by fines imposed by an organization upon its members, is not correct, and also, perhaps, that, even if correct, it is not applicable to the facts of this case, and are unwilling to accept that principle as law in this Commonwealth notwithstanding the authority of that case, it may be well to say something in addition to what was there said. We are also somewhat influenced to take this action by reason of the importance of the question and its relation to a part of the law still in the nebulous but clearing stage.

Before entering more fully upon the discussion it is well to get a clear conception of what the case is. To begin with, it is not a contest between the members of two competing labor unions, as was in *Plant v. Woods*, 176 Mass. 492, nor is it a conflict between an organization and one of its members in a matter in which no third party is interested. Neither does the plaintiff corporation contend that it has any right to compel the intimidated workmen to enter its employ. Nor is it seeking, in behalf of a member of a union, to enforce or defend the right of such member to be free from a fine or threat of a fine. The plaintiff has no concern with the imposition of fines by a union upon its members unless, and only so far as, such an imposition is in violation of a right of the plaintiff. Even if the fine be illegal the plaintiff has no standing in court to explain unless some one of its rights is invaded to its damage. In a word, the case is not between the party imposing the fine and the person fined, nor between the persons fined as such and a third party who suffers, but on the contrary it is between such third party and the party imposing the fine. If it were only between the person fined and the party imposing the fine, then with some degree of plausibility it might be said that the former had no right to complain, or at least had waived that right; but it is manifest that neither of the immediate parties to the fine can, either by an agreement among themselves or by waiver, justify the invasion of the right of a third party, if any he has, to object to it.¹

What is the complaint of the plaintiff? It is a corporation engaged in the construction of buildings and employing a number of men. Its men left its employ on a strike. To keep them away the defendants threatened with fines such as were members of the unions, and by that means kept them away from the plaintiff when

¹ "An interference with the right of a third party can not be justified upon the ground that the intruder is acting in accordance with an agreement between him and some other person. In a word, so long as a fine is imposed for the guidance of members in matters in which outside parties have no interest, or in which there is no violation of a right of an outside party, then no such party can complain. But when the right of such a party is invaded, it is no defense, either to the person fined or to those who have imposed the fine, that the invasive act was done in accordance with the by-laws of an association."

otherwise they would have stayed;—all to the great damage of the plaintiff. Shortly stated the case is this: The plaintiff's men are being coerced by threats of a fine to leave its employ, greatly to its injury, the fines to be levied in accordance with the by-laws of a voluntary association of which the proposed victims are members. This injury to the plaintiff is intended by the defendants. Has the plaintiff any standing in equity to an injunction against the infliction of such injury?

The right of an employer to free labor is subject to the right of the laborer to hamper him by many expedients short of fraud or intimidation amounting to injury to the person or property of those who desire to enter his employ, or threats of such injury. For instance, persuasion not amounting to such intimidation is lawful, and perhaps the same may be said of social pressure even when carried to the extent of social ostracism, not including however any threat in a business point of view. See *Vegelahn v. Guntner*, 167 Mass. 92; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 769; 20 Harvard Law Review, 267. Social rights and privileges must take care of themselves. The law cannot prescribe with whom one shall shake hands or associate as a friend.

In the case before us, standing opposed to each other, are these two rights: the right of the employer to a free labor market, and the right of the striking employees in their strife with him to impair that freedom; and the crucial question is, how far can the latter go? On which side of the line shall stand the matter of coercion by fines imposed by a union upon its members to impair that freedom. Is the employer's right to a free market subject to this system of mutual intimidation and coercion by fines, or is the right to establish such a system subject to the right of the employer to a free market? If the employer's right is not subject to this method of intimidation, then of course as against him it is unlawful. If it is subject to it, then he cannot complain, no matter how severe the blow.

So far as concerns the law in this Commonwealth at least, some things seem to be settled. It is settled that the flow of labor to the employer cannot be obstructed by intimidation or coercion produced by means of injury to person or property, or by threats of such inquiry. *Vegelahn v. Guntner*, 167 Mass. 92.

There can be no doubt that finding is one method of injuring a man in his estate, and that a threat to fine is a threat of such an injury.

It is urged however that although this method of intimidation is generally an invasion of the employer's right to a free market and therefore illegal, yet when the intimidation is exerted by a union upon its members in accordance with its by-laws in a strike whose object is legal, it is justifiable and legal.² To this the obvious reply

² Strike benefits and transportation to other places where work has been or can be obtained, given by a union in accordance with its pre-existing rules, to its members, is not an improper inducement, *Everett-Waddey Co. v. Richmond Typographical Union*, 105 Va. 188 (1908), in which it is also held that it is not unlawful to hold out such advantages as an agree-

is that the rule of freedom to contract is founded upon principles of public policy, that each party to a contract is interested in the freedom of the other party, that it can make no difference to the public or to the employer (who in the present case is the other party), that the person intimidated is or is not a member of the society intimidating. In either case the injury is the same and is from the same cause, namely, intimidation. The workman is no longer free. In *Longshore Printing Co. v. Howell*, 26 Ore. 527, the court, after speaking of the general right of labor unions to make rules, proceeds thus: "It must be understood, however, that these associations, like other voluntary societies, must depend for their membership upon the free and untrammelled choice of each individual member. No resort can be had to compulsory methods of any kind to increase or keep up or maintain such membership. Nor is it permissible for associations of this kind to enforce the observance of their laws, rules and regulations through violence, threats or intimidation, or to employ any methods that would induce intimidation or deprive persons of perfect freedom of action."

The keynote on this matter is struck in *Booth v. Burgess*, 65 Atl. Rep. 226, 233, in the following language: "No surrender of liberty or voluntary agreement to abide by by-laws on the part of the employees who are first coerced, made by them when they enter their labor unions, can . . . affect the right of the complainant to a free market, which right he will enjoy for all it may be worth if these employees are permitted to exercise their liberty. The employees may be able to surrender their own right, but they certainly cannot surrender the rights of other parties," citing *Boutwell v. Marr*, 71 Vt. 1, and *Berry v. Donovan*, 188 Mass. 353. And in *Downes v. Bennett*, 63 Kans. 653, 662, there is a recognition of the same doctrine: "This is not the case of a union or association of persons intimidating its members from engaging in a specific service offered by an employer, and standing ready and open to be entered. In such cases, on a showing of continuous damage caused by inability to secure employees, preventive relief has been afforded." *Boutwell v. Marr*, 71 Vt. 1.

An opposite doctrine leads to strange conclusions. For in-

ment to induce non-union men to join the union in order to enjoy them. But the payment of money to a non-union man to abandon employment is said to be bribery and unlawful, and so it is intimated is the gift of transportation. In *Barnes v. Typographical Union*, 232 Ill. 424 (1908), the Supreme Court of Illinois affirmed an injunction restraining the defendants from offering transportation or similar pecuniary inducements to employees or would be employees to leave or refuse the complainant's employment, and among the acts of which Hammond, J. in the principal case, states that the defendants have been guilty, is the offer of such transportation. See also, *Frank v. Herold*, 63 N. J. Eq. 446 (1902), Pitney, V. C., *contra*, *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Assn.*, 59 N. J. Eq. 49 (1899), Reed, V. C. refused to restrain the president of the association from giving money to strikers and offering it to induce workers to strike; *Rogers v. Evarts*, 17 N. Y. S. 264 (1891); *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. 168 (1880), offers of transportation to places where other work could be obtained.

stance, if ten men banded together undertake by coercion to keep two other men from entering an employment, and they do this in order to force the employer, for lack of ability to get the two, to employ them (the ten), the employer's right to a free market is invaded, and if he suffers thereby he may proceed either in equity or law against the ten; but if the ten men first induce the two other men to enroll themselves in the same organization with the ten, then, it is said, the ten men may by fines or threats of fines so intimidate the two men as to frighten them from the employer; and that such intimidation is no violation of the employer's right. A rule of law which leads to such inconsistencies is not to be adopted. It does not distinguish between coercion and non-coercion, but between organized coercion and sporadic coercion. It makes a distinction entirely foreign and immaterial to the ground upon which the right to a free market is based.

If it be said that fines are not in themselves illegal, and that consequently their use cannot be illegal, the answer is that when they are used as a method of coercion and create a kind of coercion inconsistent with the right of a person they are, as against that person's right, illegal.

It is said that the member fined may take his choice either to leave the organization or abide by its rules to which he has before assented, and that where there is a choice there can be no coercion, the answer is that in almost every conceivable case of coercion short of an actual overpowering of the physical forces of the victim there is a choice. The highwayman, who presents his cocked pistol to the traveller and demands his purse under pain of instant death in case of refusal, offers his victim a choice. He may either give up his purse and live, or refuse and die. In *Carew v. Rutherford*, 106 Mass. 1, the victim had a choice either to pay a fine or take the consequences of a refusal. And so the member of a labor union has the choice either to pay the fine or leave the union. It is difficult to realize what that choice is in these days of organized labor? Is it too much to say that many times it is very difficult, indeed practically impossible, for a workman to get bread for himself and his family by working at his trade unless he is a member of a union. It is true he has a choice between paying his fine and not paying it, but is it not frequently a hard one? May not the coercion upon him sometimes be most severe and effective. Such is not a free choice. And a market filled with such men is not a reasonably free market.

If it be said that without fines the same result may be indirectly reached by the organization by exercising two rights, namely, the right to expel a member and the right to charge an initiation fee upon his return, and since the same result may thus be legitimately reached, nobody is harmed if it be reached by fine, the reply is that if the purpose of expulsion and the subsequent initiation fee be each a part of one and the same transaction, namely, the imposition of a fine, and the two acts are in substance the procedure by which the intimidation by fine is exercised, and such is the intention, then there may be a strong reason for holding that such a procedure is

one imposing a fine and should be treated as such. Ordinarily, however, each separate act should be treated by itself and its validity judged by itself. The fact that separately and independently executed they incidentally may have the effect of a fine is immaterial on the question of the right to fine. The fact that a result may be incidentally reached in one way does not show that the same result may be lawfully reached in another way.

In considering this question we cannot lose sight of the great power of organization. It should be taken into account when one is considering where the line should be drawn between the right of the employer to a free market and the right of workmen to interfere with that market by coercion through the rules of a labor union. It is not universally true that what one man may do any number of men by concerted action may do. In *Pickett v. Walsh*, 192 Mass. 572, Loring, J., after alluding to the great increase of power by combination, says: "the result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals; or to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do."

In many ways the labor unions have succeeded in bettering the condition of the laborer; and so far as their ultimate intentions and the means used in accomplishing them are legal they are entitled to protection to the extreme limit of the law.

But their powers must not be so far extended as to encroach upon the rights of others. It is clear that if the power to intimidate by fine be regarded as one of the powers which labor unions may rightfully exercise, then the right to a free market for labor,—nay, even the right of a laborer to be free,—is seriously interfered with, to the injury both of the public and the employer as well as the laborer.⁸

SHELDON, J. That is, the relative right of the plaintiff to enjoy a free labor market is modified and limited by the right of its employees to enter into an agreement or combination to secure higher wages or to improve otherwise the conditions of their employment, and for this purpose to engage in a strike and to use all rightful means to insure the success of their strike by checking, and if they can do so without resorting to wrongful means, by wholly stopping the free flow of labor to the plaintiff. But, if this be so, manifestly the plaintiff's right to a free labor market is not only not a paramount right, but it is and must be subject to the higher right of the defendants to combine and to carry on a strike by the use of what-

⁸ See the graphic picture drawn by Stevenson, V. C. in *Booth v. Burgess*, 72 N. J. Eq. 181 (1906), of the power of the business agent of a labor union who "snaps his fingers" and its members "against their will are coerced to refrain from renewing their contracts for labor with their employers" (against whom they have no complaint but who use material made by an "unfair" manufacturer) "by the fear of fines, expulsion from their labor unions, social ostracism and poverty."

ever lawful means may be in their power; and we cannot see how this right can be further limited than by restricting it to acts which are not forbidden by law, either as being unlawful in themselves or at variance with a sound public policy. Accordingly, the question now to be decided is whether we can say that the members of a labor union have no right, acting in conformity with rules previously established, to impose a fine upon one of their own members if he goes to work or continues to work for an employer against whom a justifiable strike has been declared in accordance with those rules, where there is no contractual right or duty on either side for the performance of such work.

If we are right in what thus far has been said, the answer to this question must depend upon whether the imposition of such a fine is either forbidden by some rule of law or is found to be inconsistent with some principle of public policy. But in our opinion neither of these affirmations can be made.

We cannot make the law to be enforced against labor unions in this respect more stringent than that which is applicable to other organizations established for proper purposes. Such unions are voluntary associations. They are formed for proper purposes. Their objects are not only lawful, but commendable. The right of labor unions to enforce, under penalty of fine or expulsion, compliance by all their members with rules and regulations which have been adopted because deemed by a sufficient majority to be for the common good and which are not in themselves inappropriate or unlawful, is necessary to their continued existence. It is to the united action of all their members that such organizations owe their strength and ability to accomplish the results at which they aim. Doubtless persons who do not agree in the desirability of those results or in the wisdom or efficiency of the means adopted to secure them, cannot be required to continue as members against their will, any more than they could have been compelled to become members in the first instance. So long, however, as such membership continues and the organization still serves the purpose for which it was created, "the will of the individual must," as was said by the court in *Wabash Railroad v. Hannahan*, 121 Fed. Rep. 563, "consent to yield to the will of the majority, or no organization whether of society into government, capital into combination, or labor into coalition, can ever be effectual. The individual must yield in order that the many may receive a greater benefit. The right of labor to organize for lawful purposes and by organic agreement to subject the individual members to rules, regulations and conduct prescribed by the majority, is no longer an open question in the jurisprudence of this country."⁴

⁴This last sentence is from the opinion of Adams, J. in *Wabash R. R. v. Hannahan*, 121 Fed. 563 (1903), p. 71, in which it was held immaterial that a large majority of the workmen principally interested, voted against the strike (as to this see, also, *Saulsberry v. Coopers' Union*, 147 Ky. 170 (1912)). He further says, "The will of the individual must consent to yield to the will of the majority, or no organization either of society into government, cap-

In *Quinn v. Leathem*, (1901) A. C. 495, the fines imposed were not treated as in themselves objectionable, but the decision was put upon the ground that the defendants had acted, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. See language of Lord Stroud, p. 514. So in *Brennan v. United Hatters*, 44 Vroom, 729, it was assumed that the imposition of fines, even up to the amount of \$500, might be lawful; but the case turned upon the fact that the plaintiff had not had such notice and trial as were guaranteed to him by the rules of the union. In *Booth v. Burgess*, 65 Atl. Rep. 226, the object of the fines was to enforce a strike which was merely sympathetic or in the nature of a boycott, such as was held to be unjustifiable in *Pickett v. Walsh*, 192 Mass. 572. In *Purvis v. United Brotherhood*, 214 Penn. St. 348, a strong decision against the coercion of an employer by sympathetic strikes against his customers, it was assumed throughout the opinion that the officers of the labor union would not have been prevented from enforcing by peaceful means upon their own members the rules of the union forbidding its members to work upon non-union material; and this would include the right to impose the penalties established by those rules. In *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, affirmed on appeal in (1892) A. C. 25, it appeared that conformity to the rules of the association was enforced by a penalty of dismissal, a severer and more drastic remedy than a mere pecuniary penalty, which practically could usually be enforced only by expulsion, and this fact was relied upon by the plaintiff upon the appeal (p. 30); but both Lord Watson and Lord Morris declined to treat this threat of expulsion as involving any wrongful intimidation (pp. 43, 49, 50). The member of a union upon whom such a fine has been lawfully imposed in accordance with by-laws to which he has himself previously assented, is no respect in the predicament of a highwayman's victim who has the bare option of parting with his money to save his life or of losing his life without thereby saving his money. The situation of one who finds himself compelled to choose between two alternatives, however distasteful, which he has brought upon himself and neither of which is unlawful, is in no way comparable to that of one who is compelled by wrongful force to elect between submitting to one of two alternative injuries, both of which are unlawful. An argument which rests upon such a comparison is without foundation.

Nor can we say that the imposition of fines, not in themselves unlawful and not injurious to the plaintiff except as they restrict an inferior right by the lawful exercise of a higher right, is to be re-

ital into combination, or labor into coalition, can ever be effected. The individual must yield in order that the many may receive a greater benefit." And see Taft, J. in *Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. 803 (1894), p. 817, "The officers they appoint . . . if they choose to repose such authority in any one, may order them, on pain of expulsion from the order, peaceably to leave the service of their employer because any of the terms of their employment are unsatisfactory."

garded as contrary to a sound public policy. Gloomy vaticinations of injurious results to be apprehended from the excessive power which labor unions may acquire by their combination of many individuals into one body do not greatly impress us. The power of capital hitherto has not been found insufficient to prevent other than proper advantages from being gained by the representatives of labor, nor does it seem to us likely to be insufficient in the future. If it shall appear that there is such a danger, yet we cannot alter the law by denying to labor unions the rights and powers which the law gives to all lawful associations.

The law does not do so vain a thing as to allow the formation of labor unions and to declare their right to initiate and by lawful means to carry on a justifiable strike, and then refuse them the use of the only practical means by which their acknowledged rights can be secured.

We do not consider that the point actually decided in *Martell v. White* was necessarily inconsistent with the view here taken. So far, however, as the general doctrine of that case is applicable to fines imposed for a violation of rules lawful in themselves and not sought to be enforced for a purpose either strictly unlawful or opposed to public policy or inconsistent with the general welfare of the community, we are not willing to follow it. We do not think that the court can distinguish between the coercive effect of larger and smaller fines, or say as matter of law that they do, by reason merely of their magnitude, amount to moral intimidation. All fines are necessarily coercive in their operation, if they have any effect whatever.

LORING, J. For the reasons stated in the opinion of Mr. Justice Sheldon I should agree with the conclusion there reached were it not for the recent decisions made by this court in *Martell v. White*, 185 Mass. 255.

In my opinion the decision in *Martell v. White* ought not to be overruled in the case at bar although it was wrong, provided laborers and labor unions will not suffer injustice from our standing by it.

All that was decided in *Martell v. White* and all that is up for decision in the case at bar is that the imposition of a fine is the use of unlawful means.

It was not decided in *Martell v. White* that in case a member of a labor union (which has instituted a strike to get higher wages, for example) goes to work for the employer in question at the old rate, he cannot be expelled.

Neither was it decided in *Martell v. White* that since the labor union, in the case put above, can expel such a member, it cannot, if he goes to work for the old rate of pay, threaten to expel him for the purpose of keeping him in the ranks of the labor union, that is to say, in the ranks of the strikers.

Further, it was not decided in *Martell v. White* that if a member in the case put above is subject to expulsion because he has deserted the union and gone to work for the lower rate of pay, the union is not at liberty to impose upon him the payment of a sum of

money for the common benefit as a condition of his reinstatement. In such a case the union is not bound to expel the deserter. It is at liberty to take him back. On the other hand, since it can expel him and at the same time is at liberty to take him back, it can take him back on such terms as it may choose to impose, including the payment of a sum of money to the union for the common benefit.

And finally, since it may do this it may threaten to do this to keep such a fellow member from going back to work at the old lower rate of pay. There is nothing in *Martell v. White* which denies or pretends to deny this right to a labor union.

A payment imposed upon a deserting member of a labor union under the circumstances stated above is not, using words accurately, a fine. The difference is that a fine is imposed upon a former member for breaking the by-laws while he was a member, and can be collected whether the deserting member returns to the ranks of the union or not, while such a sum as is described above is a condition of the reinstatement of a member who has been expelled or is subject to expulsion, and cannot be collected if the member does not choose to be reinstated.

But although there is a difference between a fine and such a payment as is described above, the difference between the two is of no practical consequence to labor unions. So long as a labor union can impose upon a member who is subject to expulsion the payment of a sum of money as a condition of his reinstatement, the right to impose a fine (giving to that word its accurate meaning) is of no practical consequence. No labor union in the past ever attempted to collect a fine from a member who had left the union and did not seek reinstatement. And no labor union will ever find it worth while to enter on such litigation. The game is not worth the candle. It is because the difference between these two things is not of practical consequence that I think that *Martell v. White* should not be overruled.⁵

MINASIAN v. OSBORN.

Supreme Judicial Court of Massachusetts, 1911. 210 Mass. 250.

Appeal from a decree in the Superior Court restraining the defendants from maintaining a strike for the purpose of compelling the plaintiff Minasian, to discharge his father, employed by him as a helper.

⁵ It is clear that the imposition of a fine upon an employer who has employed non-union workmen, the payment of which is enforced by threat to strike or a threat to impose such a fine if such workmen are employed is unlawful, and such a workman thereby driven from or refused employment can recover in an action at law punitive damages as well as damages for his loss of employment, *Carter v. Oster*, 134 Mo. App. 146 (1908), and the employer paying such fine under fear of a strike may recover it back in an action of money had and received as paid under duress, *Burke v. Fay*, 128 Mo. App. 690 (1908); *March v. Bricklayers' Union*, 79 Conn. 7 (1906), *Carew v. Rutherford*, 106 Mass 1 (1870), fine imposed for violation of the

RUGG, C. J. The plaintiff Minas, a skilled laster by trade, had a contract for labor as laster with the Randall Adams Company, terminable at the will of either. With the consent of his employer, he had in turn employed as helper his father, Hampartsoon, the other plaintiff, who was not able to do all the work of a laster, and who received no wages from the Randall Adams Company and had no relation as servant to it. The work was piece work, and Minas alone received, and was entitled to receive, the compensation for their joint labor. This method of work was known in the craft as "contract" or "cross-handed."

The defendant Osborne, who is the business agent of the Lasters' Union Local No. 1, notified the employer, the Randall Adams Company, that unless the father was discharged the shop's crew would be "pulled out." The father did not work for a day or two, but returned to work after the superintendent of the employer told the son, Minas, to get him and put him to work again. The next day all the other lasters went out on an orderly strike, which was indorsed by the Union. As a consequence, both plaintiffs have lost their employment. The Lasters' Union substantially controls the labor market in the manufacture of shoes, for practically all lasters are members of the Union. The effect of the strike, if continued, will be to prevent Randall Adams Company from continuing business unless it discharges Minas or compels him to dispense with his assistant.

This is not a strike which involves any inquiry as to the plaintiff's habits, conduct or character which might render them unfit or improper shopmates. It is not for the establishment of any system of shop work or rules directed to the curtailment or limitation of production or interference with reasonable industrial advancement. It is not aimed to prevent the highest efficiency of labor or the use of modern or economical machinery. It is not instituted to promote a closed shop or to compel anybody to join or to leave any union, nor primarily to cause the discharge or employment of any person or class of persons. If this results in any instance, it is incidental and not essential to the chief end. It does not go to the extent of interdicting the absolute and unqualified right of the individual to work, if he desires, contrary to the will or rules of a combination. It is not based upon objections to shop rules established for the reasonable protection of the rights of the employer or promotion of the good order or economical and efficient service of employees. It is not directed against the education of apprentices or those who are trying to learn the trade. It does not appear to be for the establishment or preservation of a monopoly, and this is not indicated by the framework of the bill. It is not directed against piece work as distinguished from day work, nor against any other method of em-

unions' rule that the employer should not have any of his work done outside of his own yard, paid under threat of strike. It would seem that a strike to prevent such work to be so done would be now held in Massachusetts to be for a lawful purpose, see *Pickett v. Walsh*, 192 Mass. 572 (1906).

ployment where superior skill, dexterity or swiftness secures commensurately higher rewards than inefficiency, carelessness or slothfulness. It does not directly or immediately affect the general convenience, necessities or safety of the public. Its ostensible object is not used as a mask for any ulterior design. The direct and main purpose is to secure a change in a system of work which is asserted to be unjust in its practical operation.

It is contended that this system in its final analysis resulted in an unequal distribution of the work of lasting in slack times and thus affected the wages of the strikers, although it did not so operate when there was work enough to keep all the employees busy all the time. The finding of the Superior Court was in substance to this effect and it is supported by evidence. There is nothing to indicate that the strike was not undertaken in good faith against this system. An honest effort to better conditions of employment by laborers is lawful. The right of the plaintiffs to work upon such terms as they chose is incident to the freedom of the individual. That "right . . . could not be taken away . . . or interfered with by the defendants unless it came into conflict with an equal or superior right of theirs." *DeMinico v. Craig*, 207 Mass. 593, 599. The right of one person to dispose of his labor freely is not superior to the same rights in others. The right of one to work under unsanitary conditions does not go to the extent of preventing others from striking in order to secure a mitigation of these conditions merely because such a strike may interfere with the desire of the first to continue to work under those conditions. The same principle applies where a distribution of work discriminates between men of average capacity and gives an undue preference to one over another in times when there is a dearth of work. A system of giving out work which, under existing conditions, operates unjustly, is a condition of employment in which all workmen affected by it in a particular shop may have a legal interest. Nor is injury to the employer a reason why a strike to remedy such a condition should be enjoined.

DEMINICO v. CRAIG.

Supreme Judicial Court of Massachusetts, 1911. 207 Mass. 593.

LORING, J. Whether the purpose for which a strike is instituted is or is not a legal justification for it, is a question of law to be decided by the court. To justify interference with the rights of others the strikers must in good faith strike for a purpose which the court decides to be a legal justification for such interference. To make a strike a legal strike it is necessary that the strikers should have acted in good faith in striking for a purpose which the court holds to have been a legal purpose for a strike, but it is not necessary that they should have been in the right in instituting a strike for such a purpose. On the other hand a strike is not a strike for a legal purpose because the strikers struck in good faith for a pur-

pose which they thought was a sufficient justification for a strike. As we have said already, to make a strike a legal strike the purpose of the strike must be one which the court as a matter of law decides is a legal purpose of a strike, and the strikers must have acted in good faith in striking for such a purpose.

The purpose of the strike here in question has been found to have been to get rid of two foremen because some of the workmen had personal objections to and a dislike for them. Or, to use the words of their own counsel, because these foremen were "distasteful to (some of) the employees."¹ We are of opinion that that is not a legal purpose for a strike. The plaintiff had a right to work and that right of his could not be taken away from him or interfered with by the defendants unless it came into conflict with an equal or superior right of theirs. The defendants' right to better their condition is such an equal right. But to humor their personal objections, their likes and dislikes, or to escape from what "is distasteful" to some of them is not in our opinion a superior or an equal right.

It is doubtless true that in a certain sense the condition of workmen is better if they work under a foreman for whom they do not have a personal dislike, that is to say, one who is not "distasteful" to them. But that is not true in the sense in which those words are used when it is said that a strike to better the condition of the workmen is a strike for a legal purpose. One who betters his condition only by escaping from what he merely dislikes and by securing what he likes does not better his condition within the meaning of those words in the rule that employees can strike to better their condition.

The defense in the case at bar has not failed because a strike to get rid of a foreman never can be a strike for a legal purpose. We can conceive of such a case. If, for example, a foreman was in the habit of using epithets so insulting to the men that they could not maintain their self-respect and work under him, a strike to get rid of him in our opinion would be a legal strike. It is not necessary in the case at bar to define such cases and lay down their limits. It is wiser, in our opinion, in matters such as we are now dealing with, to go no farther than to decide each case as it arises. What we have just said is said to prevent misapprehension as to what is now decided. What we now decide is that a strike to get rid of a foreman because some of the employees have a dislike for him is not a strike for a legal purpose.²

¹The master in his findings of fact states that this dislike was caused by the rigid but not oppressive enforcement of the employer's reasonable rules.

²In *Reynolds v. Davis*, 198 Mass. 294 (1908), Knowlton, J. dissenting intimated that a strike to procure the discharge of non-union men would be lawful, if as such they were personally objectionable to the union strikers. In *Giblan v. National Amalgamated Laborers' Union*, L. R. 1903, 2 K. B. 600; *Blanchard v. Newark Joint District Council*, 77 N. J. L. 389 (1909), and *Connell v. Stalker*, 45 N. Y. S. 1048 (1897), it is held that a strike or threat to strike to compel the employer to discharge the plaintiff because he refused to pay money alleged to be due the union or to pay a fine, or unless he pays it, is unlawful. In *Conway v. Wade*, L. R. 1909, A. C. 506,

HUSKIE *v.* GRIFFIN.*Supreme Court of New Hampshire, 1909. 75 N. H. 345.*

Case, for interfering with the employment of the plaintiff in the McElwain shoe factory. Trial by jury. At the close of the plaintiff's evidence a nonsuit was ordered, subject to his exception. Transferred from the January term, 1909, of the superior court by PLUMMER, J.

The plaintiff's evidence tended to prove that while he was employed by the defendant he applied for an increase of wages and was told by the defendant's superintendent that he was at liberty to leave at any time if he could better himself. He sought employment elsewhere and one day received a note stating that he could have work at the McElwain factory. He showed the note to Griffin's superintendent, who made no objection to the proposed action, but at once went to the office and drew the plaintiff's wages for him. As soon as the plaintiff had left, Griffin telephoned to Trull, superintendent of the McElwain shop. Trull's testimony as to the conversation with Griffin was in part as follows:

"He telephoned and said there was a man from my factory came up to his factory with a note and hired, or was about to hire, one of his men, right in the middle of the day, and wanted to know if I thought that was a nice thing to do. I said it was not, and that I would not hire the man; and when I found out about it I told our man not to hire him."

Q. "That is, you instructed your agent not to hire him " A. "Yes, sir; but after that Griffin told me I could hire him, but I told him I didn't want him."

Q. "That was a little ironical, wasn't it, Mr. Trull?" A. "Well, during the same conversation, right afterward, he said, 'You can have him if you want him, you can hire him.'"

Q. "And you understood that to be a little ironical, didn't you?" A. "I didn't understand anything about it."

Q. "Well, you didn't hire him, anyhow?" A. "No, sir; I didn't hire him."

On cross-examination the witness stated the conversation more favorably to the defendant.

When the plaintiff reached the McElwain factory he was refused employment. He then returned to the defendant, who complained because the plaintiff received a note in the shop. The conversation became heated, and the defendant refused to comply with the plaintiff's request to telephone to Trull and adjust the matter.

PEASLEE, J. Beyond the issues of fraud and malicious injury lies one which has caused much of perplexity and conflicting adjudication. How far advantage may or may not lawfully be gained by appeal, persuasion, or

it is held that it is for the jury to say whether a controversy as to the discharge of an employee, asked for such a purpose, was a "trade dispute" within the meaning of Section 3 of the British Trade Disputes Act of 1906. See also, *Joost v. Syndicat*, Cour d'Appel de Chambéry 1893, Sirey 93, 2, 139, cited in *Perrault v. Gauthier*, 28 Can. Sup. Ct. 241 (1898); *Oberle v. Syndicat des Ouvriers*, Cour d'Appel de Lyon 1894, Dalloz 94, 2, 305; and *Monier v. Renaud*, Cour de Cassation 1896, Dalloz 1896, 1, 582 and Ames, 18 Harvard Law Review 418.

threat of loss of future favor,—whether those not involved in the initial contest may be dragged into it by these and kindred means,—are questions which courts, jurists, and publicists have not found it easy to answer.

The more recent authorities reason that, as the right to deal or not to deal with others is inherent in the idea of Anglo-Saxon liberty, *prima facie* a man can demand an open market; and since this is so, one who interferes with this free market must justify his acts or respond in damages. Thus far these authorities are uniform; but when they proceed to the determination of what amounts to a justification, they differ widely. The cause is not far to seek. The rule which they apply is that of reasonable conduct, yet they discuss and decide each case as though it involved only a question of law. In reality, the issue is largely one of fact, and the result is what would be expected. Judges are men, and their decisions upon complex facts must vary as those of juries might on the same facts. Calling one determination an opinion and the other a verdict does not alter human nature, nor make that uniform and certain which from its nature must remain variable and uncertain. While these cases go too far in what they decide as questions of law, yet the test they constantly declare they are applying is the true one. The standard is reasonable conduct under all the circumstances of the case. *Berry v. Donovan*, 188 Mass. 353; *Macauley v. Tierney*, 19 R. I. 255; *Doremus v. Hennessy*, 176 Ill. 608.

In this state the question of reasonable conduct, whether in relation to tangible property or to intangible rights, is one of fact. *Ladd v. Brick Co.*, 68 N. H. 185, and cases cited. But while the question to be settled is within the province of the jury, there are still legal propositions involved in the case. It must be determined whether there is anything for the jury to weigh—whether the evidence is not conclusive one way or the other upon the issue of reasonable conduct.

At the present time no one would think of submitting to a jury the question whether a peaceful strike for higher wages was reasonable. They would be told, as matter of law, that such action was within the laborer's rights. So there may be conduct which is clearly unreasonable, or not justifiable. An illustration of such conduct is presented by the second ground for recovery in this case. One may not interfere with his neighbor's open market or "reasonable expectancies" solely for the purpose of doing harm. It has been said, however, in several cases that a wrongful motive can not convert a legal act into an illegal one, and many judges have thought this was the end of the law upon the question. They seem to proceed upon a theory of absolute right in the defendant, which is at variance with the holding in many of the same cases, that the defendant may be called upon to justify his conduct. Indeed, the authorities are practically unanimous to the effect that the defendant is liable unless he shows a justification. If this is true, it follows, as a matter of course, that his right is not absolute. It is a qualified one, and the rightfulness of its exercise depends upon all those elements which go to make up a cause for human action. The reasonableness of the act can not always be satisfactorily determined until something is known of the state of the actor's mind.

Since the defendant is called upon to justify,—to show reasonable cause for the interference with his neighbor's right,—it seems to clearly follow that where his only reason is his malicious wish to injure the plaintiff, he

has no justification. It is a contradiction in terms to say that a desire to do harm for the harm's sake can be called a just motive.

The same reason applies here. If the evidence had been conclusive that the act was done solely from a malicious motive,¹ a verdict would have been directed for the plaintiff. It is not improbable that there are other plain cases—cases where there is nothing for the jury to pass upon. The third issue in this case does not come within that class. It can not be said that all reasonable men would conclude that every reasonable man would or would not do what the defendant did, even though he acted honestly and from a proper motive. If any one doubts this assertion, he has but to read the cases where this and kindred questions have been discussed and decided as those of law. *Vegelahn v. Guntner*, 167 Mass. 92; *Berry v. Donovan*, 188 Mass. 353, and cases there cited; *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110; *National Protective Ass'n v. Cumming*, 170 N. Y. 315; *Jacobs v. Cohen*, 183 N. Y. 207; *Wilson v. Hey*, 232 Ill. 389; *Barnes v. Union*, 232 Ill. 424. When eminent judges come to opposite conclusions upon a question, it can hardly be said that jurors might not reasonably do the same.

The plaintiff was entitled to go to the jury upon all three grounds which have been considered: (1) Fraud, (2) malicious injury, and (3) unreasonable interference with the open market.

2. The right to boycott.

PARKINSON CO. v. BUILDING TRADES COUNCIL.

Supreme Court of California, 1908. 154 Cal. 581.

SLOSS, J., concurring.¹—What is particularly to be borne in mind is that we are not here concerned with a strike or boycott presenting any of the features of violence, either expressly or impliedly threatened, to be found in so many of the decided cases. There was here no effort or threat to interfere by physical force with the plaintiff or its employees, nor any intimidation of employees or customers, using the term "intimidation" as meaning an act tending to inspire fear of violence to person or property.

Nor need we here consider how far it is unlawful, whether by persuasion or other means, to induce one of the parties to a contract to break it to the damage of the other. As is pointed out in the opinion of the chief justice any acts of this character that may have been committed by the defendants had occurred prior to the commencement of the action, and there was no evidence that any further

¹ In that part of the opinion dealing with the second ground on which the plaintiff bases his right to recover, i. e., malicious injury, the learned justice says, p. 348, "The state of mind of an offending person may be proved in various ways. It may appear that there was no good reason for doing the act. In that case malice may be inferred from the proved absence of other motive for the act done. In case there be a sufficient justifiable motive, it may prove that in fact malice was the moving force. In either case the question is one of fact."

² The facts are sufficiently stated in the dissenting opinion of Shaw, J.

interference in this direction was to be anticipated. There was, therefore, no basis for enjoining such acts.

The real question in the case turns upon the activities of the defendants exerted in two ways: 1. In ceasing to work for the plaintiff (striking), and 2. In notifying (or threatening, if that term be preferred) the customers of plaintiff that workmen affiliated with the Building Trades Council would not work for contractors using materials purchased of plaintiff.

That workmen employed by the Parkinson Company had a right to leave its employ whenever they desired, and for any reason that might seem to them sufficient, is universally conceded. Was it unlawful to notify contractors dealing with the Parkinson Company that union men would not continue to work for them if they purchased material of said Parkinson Company? In this inquiry, I think it is unimportant that the defendants were merely acting in accordance with a rule adopted before any difference with the plaintiff had arisen. The opinion of the chief justice appears to proceed upon the theory that, since the defendants had bound themselves to act in a certain way in the event of a controversy of this kind, it was not only proper, but laudable, for them to notify contractors of their intended action and of the consequences which would follow to contractors who should continue to deal with the plaintiff. More than this, that it was in some way incumbent upon plaintiff to notify contractors dealing with him that a continuance of their patronage would be likely to result in loss to them. I cannot agree to the proposition that the rights of the parties are in any way affected by such considerations. If the defendants' course of conduct amounted to an unlawful interference with plaintiff's rights, it was not made lawful by the fact that the defendants had decided, in advance, to act in this way whenever an occasion should present itself.

But was their action unlawful? They had a right, as has been said, to cease working for Parkinson. They had an equal right to cease working for any other employer. Upon what ground, then, is it claimed that while their refusal to work for plaintiff gave plaintiff no cause of complaint, the refusal to work for others did give plaintiff a ground of action? Because, it is said, they are bringing to bear upon the Parkinson Company, with which they have a controversy, the pressure of loss inflicted by third persons, not connected with the main dispute, and are, by holding over these third persons the risk of financial loss, compelling them, against their will, to inflict upon Parkinson the damage resulting from a cessation of their patronage. This is the argument commonly advanced to establish the illegality of what has been called, in much of the recent discussion of the subject, a "secondary" rather than a "primary" boycott. I do not see that we are helped to a solution of the question of the illegality of the defendant's acts by looking into the "motive" or "intent" with which they acted. Even if we assume, contrary to the decisions of this court, that an improper motive may, as a general proposition, render actionable an act otherwise lawful, or, to

use another form of statement, that damage intentionally inflicted will be actionable unless its infliction can be justified by showing that it was inspired by a proper motive, the motive with which these defendants acted was not, in my opinion, one which the law regards as improper. The defendants were seeking, in all they are shown to have done, to secure employment by the plaintiff for themselves, to the exclusion of those not associated with them, and to secure the employment upon terms deemed satisfactory or advantageous to them. That is the effort of every dealer in goods; it is the struggle of competition, and is no more to be frowned upon where the subject of trade is labor than where it is a specific commodity. The uniting or combining of a number of persons to accomplish a lawful object by lawful means will not, *per se*, render the conduct of the many any more unlawful than would be the same conduct on the part of any one of them. "It is plain," as is said by Mr. Justice Holmes in his dissenting opinion in *Vegeahn v. Guntner*, 167 Mass. 92, 108, (57 Am. St. Rep. 443, 44 N. E. 1077), "from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. . . . One of the eternal conflicts out of which life is made up that is between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way."

The injunction then, must rest upon the principle that it is unlawful, in an effort to compel A to yield a legitimate benefit to B, for B to demand that C withdraw his patronage from A, under the penalty of losing B's services or patronage, to which he has no contract right. That there are many cases sustaining the affirmative of this proposition is true.²

² Citing *Thomas v. Cincinnati, etc., Ry. Co.*, 62 Fed. 803 (1894); *Hopkins v. Oxley Stave Co.*, 83 Fed. 912; *Vegeahn v. Guntner*, 167 Mass. 92, 108; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497; *Gray v. Building Trades Council*, 91 Minn. 171; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101; *Lucke v. Clothing C. & T. A.*, 77 Md. 396 (1893); *Jackson v. Stanfield*, 137 Ind. 592; *Crumph v. Commonwealth*, 84 Va. 927. See also, *accord*, *Casey v. Cincinnati Typographical Union*, 45 Fed. 135 (1891); *Gompers v. Bucks Stove, etc., Co.*, 221 U. S. 418 (1911); see *Loewe v. Lawlor*, 208 U. S. 274 (1908), holding a combination to destroy an interstate business by a boycott is a combination in restraint of trade within the Anti-Trust Act of July 2, 1890; *American Federation of Labor v. Bucks Stove Co.*, 33 D. C. App. 83 (1909); *Wilson v. Hey*, 232 Ill. 389 (1908); *My Maryland Lodge v. Adt*, 100 Md. 238 (1905), union men notified not to drink beer brewed by brewers who purchased complainant's machinery; *Rocky Mountain Bell Tel. Co. v. Montana Fed. of Labor*, 156 Fed. 809 (1907); *Pickett v. Walsh*, 192 Mass. 572 (1906); *Lohse Door Co. v. Fuelle*, 215 Mo. 421 (1908), injunction granted to restrain a union from threatening to call out all union men employed by builders if they used the complainant's goods; *Piano and Organ Workers' International Union v. Piano & Organ Supply*

So there are many to the contrary.³

Upon a consideration of the authorities I think the sounder is that one who is under no contract relation to another may freely and without question withdraw from business relations with that other. This includes the right to cease to deal, not only with one person, but with others; not only with the individual who may be pursuing a course deemed detrimental to another who opposes it, but with all who by their patronage aid in the maintenance of the objectionable policies. In other words, if the defendants violated no right of the Parkinson Company by refusing to work for it, they violated none by refusing to work for contractors who used material bought of Parkinson. Such refusal, as is shown in the opinion of the chief justice, and as is stated in the testimony of plaintiff's manager and principal witness, was the "sum total of the interference" which was practiced or threatened. An agreement by shipowners, in order to secure a carrying trade exclusively by themselves, that agents of members should be prohibited upon pain of dismissal from acting in the interest of competing shipowners (*Mogul Steamship Co. v. McGregor*, L. R. (1892) App. Cas. 25); a combination of retailers binding the members to refuse to purchase of wholesalers who should sell to non-members of the combination (*Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119); *McCauley Bros. v. Tierney*, 19 R. I. 255, (61 Am. St. Rep. 770, 33 Atl. 1); an agreement of contractors to withdraw their patronage from

Co., 124 Ill. App. 353 (1906); *Irving v. Joint District Council*, 180 Fed. 896 (C. C. S. D. of N. Y. 1910); *Shine v. Fox Bros. Mfg. Co.*, 156 Fed. 357 (1907); *Moore v. Bricklayers' Union*, 10 Ohio Dec. (Reprint) 665 (1889); *Metallic Roofing Co. v. Jose*, 12 Ont. L. R. 200 (1906); *Schlang v. Ladies' Waist Makers' Union*, 124 N. Y. S. 289 (1910); *Beattie v. Callanan*, 82 App. Div. 7 (N. Y. 1903); *Albro Newton Co. v. Erickson*, 126 N. Y. S. 949 (1911); *Purvis v. United Brotherhood Carpenters & Joiners*, 214 Pa. St. 348 (1906); *Longshore Printing Co. v. Howell*, 26 Ore. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. 640 (1894); *Patch Mfg. Co. v. Protection Lodge*, 77 Vt. 294 (1904), threats to withdraw patronage from boarding houses and shops serving strikebreakers; *Loewe v. California Federation of Labor*, 139 Fed. 71 (C. C. N. D. of Cal. 1905); and see *Booth v. Burgess*, 72 N. J. Eq. 181 (1906); *Jonas Glass Co. v. Glass Blowers' Assn.*, 77 N. J. Eq. 219 (1910), and *Davis Mach. Co. v. Robinson*, 84 N. Y. S. 837 (1903).

³Citing *Mogul S. S. Co. v. McGregor*, L. R. 1892, A. C. 25; *National Protective Assn. v. Cumming*, 170 N. Y. 315; *Cote v. Murphy*, 159 Pa. St. 420; *McCauley Bros. v. Tierney*, 19 R. I. 255; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; *Payne v. Western, etc., R. Co.*, 13 Lea 507 (Tenn.) *Heywood v. Tillson*, 75 Maine 225; *Raycroft v. Tayntor*, 68 Vt. 219; *State v. Van Pelt*, 136 N. Car. 633 (1904); *Lindsay & Co. v. Montana Fed. of Labor*, 37 Mont. 264 (1908), of which only the two last concern the legality of a boycott used by organized labor as a means of forcing their employer to concede to their demands. In *State v. Van Pelt*, a combination for such purpose was held not to be a criminal conspiracy, and in *Lindsay v. Montana Fed.*, an injunction against boycotting by the complainant was dissolved. See also, *Meier v. Speer*, 96 Ark. 618 (1910), holding that it is not actionable for union workmen to refuse, in accordance with pre-existing rules of their union, to work for an employer employing non-union labor or on a job on which such labor is employed by any other employer, or to handle material produced by such labor, and see *Gray v. Building Trades Council*, *supra*, Note 2.

wholesalers selling to a contractor who had conceded the demands of his employees for an eight-hour day (*Cote v. Murphy*, 159 Pa. 420, 39 Am. St. Rep. 686, 28 Atl. 190); a threat by a railroad company to discharge any employee who should deal with the plaintiff (*Payne v. Western etc. R. R. Co.*, 13 Lea, 507, (49 Am. Rep. 666)); a threat by an employer that he would discharge any laborer who rented plaintiff's house (*Heywood v. Tillson*, 75 Me. 225, (46 Am. Rep. 373)) have been held to give no right of action to the individuals affected. The defendants in each case were held to be acting within their absolute legal right in entering or refusing to enter into business relations with persons to whom they were not bound by contract. I see no reason why workmen have not the same absolute right to dispose of their labor as they see fit. So long as they abstain from breach of contract, violence, duress, menace, fraud, misrepresentation, or other unlawful means, they may lawfully inflict such damage as results from the withholding of their labor or patronage. To quote again from Judge Holmes' opinion in *Vege-lahn v. Guntner*, 167 Mass. 92, (57 Am. St. Rep. 443, 44 N. E. 1077), "If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interest by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control."

The terms "intimidation" and "coercion," so frequently used in the discussion of this question, seem to me to have no application to such acts as were here committed. One cannot be said to be "intimidated" or "coerced," in the sense of unlawful compulsion, by being induced to forego business relations with A, rather than lose the benefit of more profitable relations with B. It is equally beside the question to speak of "threats," where that which is threatened is only what the party has a legal right to do.

It may be that the combination of great numbers of men, as of great amounts of capital, has placed in the hands of a few persons an immense power and one which, in the interest of the general welfare, ought to be limited and controlled. But if there be, in such combinations, evils which should be redressed, the remedy is to be sought, as to some extent it has been sought, by legislation. If the conditions require new laws, those laws should be made by the law-making power, not by the courts.

SHAW, J., dissenting.—I dissent. I think the judgment should be modified, but that it should not be reversed.

The plaintiff complains of both a strike and a boycott and asks an injunction against both. So far as the matter of the alleged strike of plaintiff's men is concerned, I think the defendants did nothing which they did not have a lawful right to do and that they used no unlawful means in doing what they did. The plaintiff was employing a number of men who belonged to the several unions represented by the Building Trades Council, and it was understood by

all the members of the unions that they would not work for an employer who persisted in employing non-union men in the business. The plaintiff employed non-union men and thereupon the union men in its employ quit work. There was no violence used and no effort made to prevent plaintiff from securing other men to work, or to prevent other men from seeking its employment. The men had an absolute right to quit work at any time. None of the defendants used any improper means to induce the men to quit. They were simply informed that the plaintiff had refused to discharge the non-union men, and thereupon, in accordance with the rules of the union, which amounted to a previous agreement of all the members, between themselves, they left the plaintiff's service.

I think the judgment is sustained by the evidence in so far as it enjoins the continuance of the alleged boycott. The defendants are forbidden to coerce plaintiff's customers to withdraw their custom from plaintiff by threats that unless they do so the defendants will cause loss to them in their business.

The respective unions represented by the Federated Trades Council were twenty-two in number. It does not appear how many members they had in the aggregate, but it is plain from all circumstances that the membership included the majority of the workmen in that vicinity engaged in the respective trades, and that they were of such numbers that if they all refused to work for any contractor engaged in building enterprises in that neighborhood, such contractor would be unable to carry on his business without substantial loss. The agreement of the union men that they would not work for any contractor who employed non-union men, or who used material made by any manufacturer or sold by any dealer who employed non-union men, was embodied in their rules adopted by them long before any difficulty had arisen with the plaintiff and without any reference whatever to the plaintiff. It was a general regulation and agreement, intended to apply to all persons and to be enforced whenever any occasion arose which made it applicable. The method of putting it in force was that the Building Trades Council, when it found any contractor, dealer, or manufacturer, employing non-union men, or using non-union materials, sent out notices to all union workmen and to other dealers and contractors that the person in question was "unfair," and thereupon it was understood that all men in the employ of such other persons would refuse to work for their respective employers unless such employer refused to use materials received or purchased from such boycotted person.⁴ When

⁴To notify union members that an employer is unfair is held in many cases to amount to an order that they shall act toward him as the rules of the union require and so is tantamount to an order to boycott, and if published to the public or to customers of the employers, amounts to a warning that to deal with him will subject them at least the risk of secondary boycott; *Lindsay & Co., Ltd. v. Montana Fed. of Labor*, 37 Mont. 264 (1908), p. 271; *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011 (1905); *Irving v. Joint District Council*, 180 Fed. 896 (1910); *Newton Co. v. Erickson*, 126 N. Y. S. 949 (1911); especially where the notice to the public calls attention to the union rule which requires union men to refuse

the Parkinson Company employed non-union men these notices were immediately sent to all its customers. As a result its customers immediately countermanded such orders to plaintiff for goods as were then unfilled and ceased thereafter to deal with plaintiff. The evidence showed that at least seven of the plaintiff's important customers quit dealing with the plaintiff, that substantial damage had already been caused to the plaintiff by this loss of custom, during the time it had continued, and that further continuance would cause plaintiff further substantial loss, that these customers were, by the aforesaid threats of defendants, coerced and compelled, against their wish and will, to cease dealing with plaintiff or using goods obtained from plaintiff, and that the defendants intended and threatened to continue their boycott indefinitely.

The claim of the defendants appears to be that these notices were for the benefit of the several persons to whom they were sent, to warn them of the consequences that might attend their patronizing the plaintiff, so that they could avoid doing so and thereby escape the evil results that would otherwise come to them, and that the sending of notices for such a purpose is not only lawful and innocent, but praiseworthy, as well; that these consequences would not come as the result of any act done with reference to the parties warned, but as the result of conditions that existed under the union rules established long before any difficulty with plaintiff arose. These rules seem to be regarded as of similar force to the law of the land and a notice not to disregard them as a friendly act similar to a notice to a friend not to violate the law. I concede, of course, that where a strike has been determined upon, the mere sending of a notice of the fact is not unlawful, or blameworthy, and cannot be made the foundation of an action. Perhaps the sending of these notices, under some circumstances, might have been considered as an act of this character. But under the circumstances disclosed in this case, and in view of the findings of the court which show that the acts of the defendants were intended to coerce plaintiff's patrons to cease dealing with plaintiff in order to injure plaintiff in its property rights, the conduct of the defendants must be considered as malicious and unlawful.

The defendants had the right, by lawful means, to persuade or induce others to cease dealing with plaintiff, although their purpose in so doing was to injure the plaintiff in its business and constrain

to patronize or work for those who are unfair, *Purvis v. Local Union* 500, 214 Pa. St. 348 (1906); so the sending of notice to contractors and builders giving a list of "fair" factories, to be patronized as such and implying that all omitted were unfair, was restrained in *Shine v. Fox Bros. Mfg. Co.*, 156 Fed. 357 (1907). See, however, *Gray v. Building Trades Assn.*, 91 Minn. 171 (1903); *Foster v. Retail Clerks' Assn.*, 78 N. Y. S. 860 (1902); *Butterick Pub. Co. v. Typo. Union*, 100 N. Y. S. 292 (1906); *Sinsheimer v. United Garment Workers*, 28 N. Y. S. 321, 77 Hun 215 (1894); *Richter Bros. v. Journeymen Tailors' Union*, 11 Ohio Dec. (Reprint) 45 (1890), and *Saulsberry v. Coopers' International Union*, 147 Ky. 170 (1912), where the court refused to restrain union strikers from carrying away the union stamp, owned by them, though the absence of the union label, stamped on the goods made, indicated that they were "unfair."

plaintiff to yield to their demands in regard to the conduct of plaintiff's business. It is only when they seek to accomplish such injury by the use of means which the law deems unlawful that their action to that end becomes unlawful and the resulting injury an actionable wrong.

The entire case depends on the question whether or not the means by which the defendants induced the plaintiff's customers to cease dealing with it were unlawful.

It is settled in this state, and for the most part in other jurisdictions also, that, in cases where one person induces another to do an act, injurious to a third person, the mere fact that the person instigating the doing of the act was actuated by a bad motive, or by malice toward the third person, will not make his instigation unlawful. (*Boyson v. Thorn*, 98 Cal. 578, (33 Pac. 492).) The effect of the authorities, in cases like the present, is that, in order to make such instigation unlawful, the customer must be induced to cease dealing with the party intended to be injured, by means of some force, intimidation, or coercion which destroys his freedom of action and constrains him to cease such dealing when he does not wish to do so and would not do so except for the constraint put upon him.⁵ It is not necessary, in order to constitute such undue influence, or coercion, that there should be any sort of physical violence done or

⁵“In *People v. Schmitz*, 7 Cal. App. 330 (94 Pac. 419), it is said that the means used to induce the injurious action toward the third party, and which, if used, will make the resulting injury actionable, includes duress, menace, fraud, and undue influence, as defined in sections 1569, 1570, 1572, and 1575 of the Civil Code. According to these sections, fraud involves deceit, duress, (involves) confinement of the person or detention of property, and menace a threat of violence to person or property or of an attack on character. Neither of these things occurred here. The class to which the conduct of the defendant belongs, if it can be characterized as illegal, is that of undue influence. In the decisions on the subject this method of influencing the action of others is usually included with various forms of menace and is designated as intimidation, or coercion. In other jurisdictions there are no code provisions defining the general principles of law such as we have in the Civil Code. By the provisions of the code above mentioned a contract which is procured by either duress, menace, fraud, or undue influence is said to be voidable. The use of such means is characterized as illegal. It is not necessary, in order to constitute such undue influence, or coercion, that there should be any sort of physical violence done or threatened, or that there should be any act done or threatened, which, in itself, and apart from its effect in controlling the action of the person coerced, would be unlawful. It is sufficient if the acts threatened, although lawful, were of such a character that if done they would cause loss or injury to the person threatened of so serious a nature that the mere threat prevents him from exercising his own will in the matter and causes him, against his will, to act injuriously to the person intended to be injured.”

In *Reynolds v. Davis*, *supra*, the court, Knowlton, J., dissenting, affirmed a decree enjoining a strike by union workers to force their employer to return to an agreement, from which he had withdrawn, by which every grievance of any workman was to be investigated by a council of the union whose decision must be accepted by the employer under pain of being declared “unfair.” The lawfulness of a strike (spoken of as “sympathetic”), not to further the common interests of the strikers but to aid a fellow workman who feels aggrieved by his employer, is discussed, the majority intimating that it is unlawful, Knowlton, J. that it is lawful.

threatened, which, in itself, and apart from its effect in controlling the action of the persons coerced, would be unlawful. It is sufficient if the acts threatened, although unlawful, were of such a character that if done they would cause loss or injury to the person threatened of so serious a nature that the mere threat prevents him from exercising his own will in the matter and causes him, against his will, to act injuriously to the person intended to be injured.

These principles are established by a great number of decisions of the courts of this country and England. One of the latest of these is *Quinn v. Leathem*, in the House of Lords App. Cas., (1901) p. 495. Leathem, a butcher, was employing non-union men. Quinn and others, members of a union, threatened Leathem if he did not discharge these men they would stop his custom and call out his union men. He refused to discharge the objectionable men and thereupon, by threats to a customer named Munce, that they would also call out his men if he did not cease dealing with Leathem, they forced Munce to comply with their demand and cease buying of Leathem, to his injury. One Dickie, a workman, was by similar means compelled to quit Leathem's service. The question was whether or not there was sufficient evidence to sustain a verdict for the plaintiff for damages. Lord Lindley's opinion is the fullest. The following is extracted from it:

"What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and customers and persons lawfully working for them, to all the inconvenience they could without violence. . . . The defendants were doing a great deal more than exercising their own rights; they were dictating to the plaintiff and his customers and servants what they were to do." (p. 536). "One man without others behind him who would obey his orders, could not have done what these defendants did. One man, exercising the same control over others as these defendants had, could have acted as they did, and if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in *Allen v. Flood*, App. Cas., (1898) pp. 128, 138, Lord Herschell expressed his opinion that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike, or threatening to make them strike by calling them out, when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen v. Flood* there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally do become, peremptory ordering, with threats, open or covert, of very unpleasant consequences to those who are not persuaded.

Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every one whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do, is a very different thing, and is *prima facie* unlawful. . . . A threat to call men out given by a trades union official to an employer of men belonging to the union and willing to work with him, is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. . . . It is said that conduct which is not actionable on the part of one person can not be actionable if it is that of several acting in concert. That may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. . . . Coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is *prima facie*, at all events, a wrong inflicted on the person coerced; and in considering whether coercion has been applied or not, numbers can not be disregarded."

In *Thomas v. Cincinnati, etc., Ry. Co.*, 62 Fed. 818, Taft, J., said: "All the employees had the right to quit their employment, but they had no right to combine to quit their employment, in order thereby to compel their employers to withdraw from the mutually profitable relations with a third person, for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever upon the character or reward of their services."

It is further argued that the only thing with which the customers were threatened was a strike of these customers' employees, that this threat was made by the men themselves, through their agents authorized to act for them, and that they had a lawful right to strike at any time and for any cause or no cause, and hence that their conduct was not unlawful. The principle settled by the cases cited, however, is that while men have a right to strike, they have no right by that means to coerce their employers so as to compel them to act to the injury of a third person. The fact that they were to strike in such numbers gave them a power over the threatened customers of plaintiff, which constituted undue influence over them, or coercion or intimidation, as most of the authorities usually express it, and this coercion, exercised for the purpose of injuring a third person, is an unlawful act and makes the resulting injury an unlawful injury, which may be enjoined if only threatened, and which, if committed, may be redressed by an action for damages. It is the control of another's conduct against his will that is the unlawful element in the proposition. This being unlawful, the resulting injury to a third person is unlawful, although every other act in the transaction is lawful in itself. So far as this unlawful element is concerned it is immaterial whether that control is obtained by fear produced by the immediate prospect of serious pecuniary loss, as the result of a threatened strike, or by fear produced by a threat of bodily injury.

PIERCE v. STABLEMEN'S UNION.

Supreme Court of California, 1909. 156 Cal. Rep. 70.

HENSHAW, J. The right of united labor to strike, in furtherance of trade interests (no contractual obligation standing in the way) is fully recognized. The reason for the strike may be based upon the refusal to comply with the employees' demand for the betterment of wages, conditions, hours of labor, in the discharge of one employee, or the engagement of another—in brief, in any one or more of the multifarious considerations which in good faith may be believed to tend toward the advancement of the employees. After striking, the employees may engage in a boycott, as that word is here employed. As here employed it means not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means—of fair publication, and fair oral or written persuasion, to induce others interested in or sympathetic with their cause, to withdraw their social intercourse and business patronage from the employer. They may go even further than this, and request of another that he withdraw his patronage from the employer, and may use the *moral* intimidation and coercion of threatening a like boycott against him if he refuses so to do. This last proposition necessarily involves the bringing into a labor dispute between A and B, C, who has no difference with either. It contemplates that C, upon the request of B, and under the moral intimidation lest B boycott him, may thus be constrained to withdraw his patronage from A, with whom he has no controversy. This is the "secondary boycott," the legality of which is vigorously denied by the English courts, the federal courts, and by the courts of many of the states of this nation.

Any act of boycotting which tends to impair this constitutional right freely to labor, by means passing beyond moral suasion, and playing by intimidation upon the physical fears, is unlawful.¹

IRONMOLDERS' UNION v. ALLIS-CHALMERS CO.

Circuit Court of Appeals, Seventh Circuit, 1908. 166 Fed. Rep. 45.

BAKER, Circuit Judge. So far as persuasion was used to induce apprentices or others (section 16 of the decree) to break their contracts to serve for definite times, the prohibition was right. And the reason, we believe, is quite plain. Each party to such a contract has a property interest in it. If either breaks it, he does a wrong, for which the other is entitled to a remedy. And whoever knowingly makes himself a party to a wrongful and injurious act becomes equally liable. But in the present case the generality of the men who took or sought the places left by the strikers were employed or were offered employment at will, as the strikers had been.

¹ In *Goldberg, Bowen & Co. v. Stablemen's Union*, 149 Cal. 429 (1906), a decree was affirmed which restrained a boycott enforced by picketing and intimidation of the employers' customers, *Underhill v. Murphy*, 117 Ky. 640 (1904); *Jensen v. Cooks' and Waiters' Union*, 39 Wash. 531 (1905).

If either party, with or without cause, ends an employment at will, the other has no legal ground of complaint. So if the course of the new men who quit or who declined employment was the result of the free play of their intellects and wills, then against them appellee had no cause of action, and much less against men who merely furnished information and arguments to aid them in forming their judgments. Now it must not be forgotten that the suit was to protect appellee's property rights. Regarding employments at will, those rights reached their limitation at this line: For the maintenance of the incorporeal value of a going business appellee had the right to a free access to the labor market, and a further right to the continuing services of those who accepted employment at will until such services were terminated by the free act of one or the other party to the employment. On the other side of this limiting line, appellants, we think, had the right, for the purpose of maintaining or increasing the incorporeal value of their capacity to labor, to an equally free access to the labor market. The right of the one to persuade (but not coerce) the unemployed to accept certain terms is limited and conditioned by the right of the other to dissuade (but not restrain) them from accepting. For another thing that must not be forgotten is that a strike is one manifestation of the competition, the struggle for survival or place, that is inevitable in individualistic society. Dividends and wages must both come from the joint product of capital and labor. And in the struggle wherein each is seeking to hold or enlarge his ground, we believe it is fundamental that one and the same set of rules should govern the action of both contestants. For instance, employers may lock out (or threaten to lock out) employees at will, with the idea that idleness will force them to accept lower wages or more onerous conditions; and the employees at will may strike (or threaten to strike) with the idea of idleness of the capital involved will force employers to grant better terms. These rights (or legitimate means of contest) are mutual and are fairly balanced against each other. Again, an employer of molders, having locked out his men, in order to effectuate the purpose of his lockout, may persuade (but not coerce) other foundrymen not to employ molders for higher wages or on better terms than those for which he made his stand, and not to take in his late employees at all, so that they may be forced back to his foundry at his own terms; and molders, having struck, in order to make their strike effective may persuade (but not coerce) other molders not to work for less wages or under worse conditions than those for which they struck, and not to work for their late employer at all, so that he may be forced to take them back into his foundry at their own terms. Here, also, the rights are mutual and fairly balanced. On the other hand, an employer, having locked out his men, will not be permitted, though it would reduce their fighting strength, to coerce their landlords and grocers into cutting off shelter and food; and employees, having struck, will not be permitted, though it might subdue their late employer, to coerce dealers and users into starving his business.

The restraints, likewise, apply to both combatants and are fairly balanced. These illustrations, we believe, mark out the line that must be observed by both. In contests between capital and labor the only means of injuring each other that are lawful are those that operate directly and immediately upon the control and supply of work to be done and of labor to do it, and thus directly affect the apportionment of the common fund, for only at this point exists the competition, the evils of which organized society will endure rather than suppress the freedom and initiative of the individual. But attempts to injure each other by coercing members of society who are not directly concerned in the pending controversy to make raids in the rear cannot be tolerated by organized society, for the direct, the primary, attack is upon society itself. And for the enforcement of these mutual rights and restraints organized society offers to both parties, equally, all the instrumentalities of law and equity.

We have not found anything in the evidence that justified the decree as to an "illegal boycott." No attempt was made to touch appellee's dealings or relations with customers and users of its goods. *Oxley Stave Co. v. Coopers' International Union* (C. C.), 72 Fed. 695; *Loewe v. Cal. State Federation of Labor* (C. C.), 139 Fed. 71; *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488. After the strike was on, appellee sent patterns, on which the strikers had been working, to foundries in other cities. The strikers procured the molders in those cities, who were also members of the Iron Molders' Union of North America, to refuse to make appellee's castings. Those molders notified their employers that they would have to cancel their contracts to make castings for appellee, or they would quit work. Some employers discharged the notifiers, others refused to cancel and the union men struck, and others complied and the union men stayed. In those instances where the foundrymen fulfilled their contracts, appellee was not damaged; in those where foundrymen broke their contracts, there is no proof that appellee has not collected or cannot collect adequate damages. That might be taken as a reason why appellee on this branch of the case is not entitled to the aid of equity. But there is a more important reason. Appellants were aiming to prevent, and appellee to secure, the doing of certain work in which the skill of appellant's trade was necessary. Here was the ground of controversy, and here the test of endurance. If appellee had the right (and we think the right was perfect) to seek the aid of fellow foundrymen to the end that the necessary element of labor should enter into appellee's product, appellant had the reciprocal right of seeking the aid of fellow molders to prevent that end. To whatever extent employers may lawfully combine and co-operate to control the supply and conditions of work to be done, to the same extent should be recognized the right of workmen to combine and co-operate to control the supply and the conditions of the labor that is necessary to the doing of the work. In the fullest recognition of the equality and mutuality of their rights and their re-

striction lies the peace of capital and labor, for so they, like nations with equally well drilled and equipped armies and navies, will make and keep treaties of peace, in the fear of the cost and consequences of war.¹

(b) Competition between trade rivals.

1. The right to induce exclusive dealings by promising or giving economic advantages.

MOGUL STEAMSHIP CO. v. McGREGOR.

Court of Appeal, 1899, and *House of Lords*, 1891. *L. R.*, 23 *Q. B. D.* 598, and (1892) *Appeal Cases*, 25.

Appeal from the judgment of Lord Coleridge, C. J., in an action tried without a jury, reported 21 *Q. B. D.* 544.

The plaintiffs were the owners of vessels used in the China and Australian trades. The several defendants were owners of vessels engaged in the China trade.

The plaintiffs claimed damages for a conspiracy to prevent them from carrying on their trade between London and China, and an injunction against the continuance of the alleged wrongful acts.

Lord Coleridge, C. J., gave judgment for the defendants.

The plaintiffs appealed.

BOWEN, L. J. We are presented in this case with an apparent conflict or antinomy between the two rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as, for the purpose of the present case, we are to assume some possible damage to the plaintiffs, the real question to be decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law. The defendants are a number of shipowners who formed themselves into a league or conference for the purpose of ultimately keeping in their own hands the control of the tea carriage from certain Chinese ports, and for the purpose of driving the plaintiffs and other competitors from the field. In order to succeed in this object, and to discourage the plaintiffs' vessels from resorting to those ports, the defendants during the "tea harvest" of 1885 combined to offer to the local shippers very low freights, with a view of generally reducing or "smashing" rates, and thus

¹ See *Searle Mfg. Co. v. Terry*, 106 N. Y. S. 438 (1905), and compare *Schlang v. Ladies Waist Makers' Union*, 124 N. Y. S. 289 (1910).

rendering it unprofitable for the plaintiffs to send their ships thither. They offered, moreover, a rebate of 5 per cent. to all local shippers and agents who would deal exclusively with vessels belonging to the Conference, and any agent who broke the condition was to forfeit the entire rebate on all shipments made on behalf of any and every one of his principals during the whole year—a forfeiture of rebate or allowance which was denominated as “penal” by the plaintiffs’ counsel. It must, however, be taken as established that the rebate was one which the defendants need never have allowed at all to their customers. It must also be taken that the defendants had no personal ill-will to the plaintiffs, nor any desire to harm them except as is involved in the wish and intention to discourage by such measures the plaintiffs from rival vessels to such ports. The acts of which the plaintiffs particularly complained were as follows: First, a circular of May 10, 1885, by which the defendants offered to the local shippers and their agents a benefit by way of rebate if they would not deal with the plaintiffs, which was to be lost if this condition was not fulfilled. Secondly, the sending of special ships to Hankow in order by competition to deprive the plaintiffs’ vessels of profitable freight. Thirdly, the offer at Hankow of freight at a level which would not repay a shipowner for his adventure, in order to “smash” freights and frighten the plaintiffs from the field. Fourthly, pressure put on the defendants’ own agents to induce them to ship only by the defendants’ vessels, and not by those of the plaintiffs’. It is to be observed with regard to all these acts of which complaint is made that they were acts that in themselves could not be said to be illegal unless made so by the object with which, or the combination in the course of which, they were done; and that in reality what is complained of is the pursuing of trade competition to a length which the plaintiffs consider oppressive and prejudicial to themselves. We were invited by the plaintiffs’ counsel to accept the position from which their argument started—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other’s trade. Obscurity resides in the language used to state this proposition. The terms “maliciously,” “wrongfully,” and “injure,” are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to “injure” in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. “Maliciously,” in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term “wrongful” imports in its turn the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs’ counsel still, therefore, leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. For the purpose of clearness, I desire, as far as possible, to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever possible.

The English law, which in its earlier stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the *animus vicino nocendi*, may enter into or affect the conception of a personal wrong. See *Chasemore v. Richards*, 7 H. L. C. 349, at p. 388. All personal wrong means the infringement of some personal right. "It is essential to an action in tort," say the Privy Counsel in *Rogers v. Rajendro Dutt*, 13 Moore, P. C. 209, "that the act complained of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interests, is not enough." What, then, were the rights of the plaintiffs as traders as against the defendants? The plaintiffs had a right to be protected against certain kind of conduct; and we have to consider what kind of conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong. See *Bromage v. Prosser*, 4 B. & C. 247; *Capital and Counties Bank v. Henty*, per Lord Blackburn, 7 App. Cas. 741, at p. 772. The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage.

What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seems to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence: *Tarleton v. M'Gawley*, Peak, N. P. C. 270; the obstruction of actors on the stage by preconcerted hissing: *Clifford v. Brandon*, 2 Camp. 358; *Gregory v. Brunswick*, 6 Man. & G. 205; the disturbance of wild fowl in decoys by the firing

of guns: *Carrington v. Taylor*, 11 East, 571, and *Keeble v. Hickeringill*, 11 East, 574, n.; the impeding or threatening servants or workmen: *Garret v. Taylor*, Cro. Jac. 567; the inducing of persons under personal contracts to break their contracts: *Bowen v. Hall*, 6 Q. B. D. 333; *Lumley v. Gye*, 2 E. & B. 216; all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause or excuse" acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been "unfair." This seems to assume that, apart from fraud, intimidation, molestation, or obstruction, of some other personal right in rem or in personam, there is some natural standard of "fairness" or "reasonableness" (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates provided they did not lower them beyond a "fair freight," whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a "fair freight?" It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to

some imaginary "normal" standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, "Thus far shalt thou go and no further." To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can in my opinion be warranted. A man is bound not to use his property so as to infringe upon another's right. *Sic utere tuo ut alienum non laedas*. If engaged in actions which may involve dangers to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider reasonable: See *Chasemore v. Richards*, 7 H. L. C. 349. If there is no such fetter upon the use of property known to the English law, why should there be any such fetter upon trade?

It is urged, however, on the part of the plaintiffs, that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy: see *Skinner v. Guntton*, 1 Wms. Saund. 229; *Hutchins v. Hutchins*, 7 Hill's New York Cases, 104; Bigelow's Leading Cases on Torts, 207. But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act by unlawful means: *O'Connell v. The Queen*, 11 Cl. & F. 155; *Reg. v. Parnell*, 14 Cox Criminal Cases, 508; and the question to be solved is whether there has been any such agreement here? Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to show that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to, if any, between the defendants must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only differentia

that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only. The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint stock-company limited, is a problem which might well puzzle a casuist. The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as fall under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is no just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence—to use a technical expression—of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from the combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of combination, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides. Legal puzzles which might well distract a theorist may easily be conceived of imaginary conflicts between the selfishness of a group of individuals and the obvious well-being of other members of the community. Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought; to buy up by preconcerted action all the provisions in a market or district in times of scarcity: see *Rex v. Waddington*, 1 East, 143; to combine to purchase all the shares of a company against a coming settling-day; or agree to give away articles of trade gratis in order to withdraw custom from a trader? May two itinerant match vendors combine to sell matches below their value in order by competition to drive a third match vendor from the street? In cases like these, where the elements of intimidation, molestation, or the other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, Was it done with or without “just cause or excuse”? If

it was *bona fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable: see the summing up of Erle, J., and the judgment of the Queen's Bench in *Reg. v. Rowlands*, 17 Q. B. 671. But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse. One may with advantage borrow for the benefit of traders what was said by Erle, J., in *Reg. v. Rowlands*, 17 Q. B. 671, at p. 687, n., of workmen and of masters: "The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

Lastly, we are asked to hold the defendants' conference or association illegal, as being in restraint of trade. The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public.

LORD ESHER, M. R.¹ "At common law," says Sir W. Erle (page 6), "every person has individually, and the public also have collectively, a right to require that the course of trade should be kept free from unreasonable obstruction." "Every person has a right under the law, as between him and his fellow-subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description—done, not in the exercise of the actor's own right, but for the purpose of obstruction—would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition; and the violation of this prohibition by a single person is a wrong, to be remedied either by action or indictment, as the case may be. It is equally a wrong whether it can be done by one or by

¹ A part of the opinion of Lord Esher and the opinion of Fry, L. J. are omitted.

many—subject to this observation, that a combination of many to do a wrong in a matter where the public has an interest, is a substantive offense of conspiracy” (p. 12). The limitation of the competing rights, then, is, that the act which has in fact obstructed the full right of the one, must, in order to be actionable, be an act done by the other beyond the exercise of the actor’s own right, and for the purpose of obstruction. In *Lumley v. Gye*, 2 E. & B. 216, and in *Bowen v. Hall*, 6 Q. B. D. 333, the act done which obstructed the plaintiff’s right was the persuading a person employed by the plaintiff, under contract, to break that contract. Such persuasion is not in ordinary course of trade. The ordinary competition of trade is a fair competition, not a secret persuasion of others to do wrong.

The propositions applicable to the present case are the following: First, that the head of law, which we are considering, applies only to trade and to traders; second, that the law has a peculiar care for the preservation of a free course of trade as between traders, because such freedom is for the benefit of the public; third, that the principal formula of law for the purpose of enforcing this peculiar care is—that every trader has a legal right to a free course of trade, meaning thereby a legal right to be left free to exercise his trade according to his own will and judgment; fourth, that if anyone, by an act wrongful as against that right, interferes with it to the injury of a trader, an action lies against such person by such trader; fifth, that any act of fair trade competition, though it injure a rival trader even to the destruction of his trade, is not a wrongful act as against such rival trader’s right, but it is only the exercise of the first-mentioned trader’s equal right, and is therefore not actionable; sixth, any act, though of the nature of competition in trade, but which is an act beyond the limits of fair trade competition, and which is therefore not an act of any real course of trade at all, and the immediate and necessary effect of which is such an interference with a rival trader’s right to a free course of trade as prevents him from exercising his full right to a free course of trade, leads to an almost irresistible interference of an indirect motive, and is therefore—unless, as may be possible, the motive is negatived—a wrongful act as against his right, and is actionable if injury ensue; seventh, an act of competition, otherwise unobjectionable, done not for the purpose of competition, but with intent to injure a rival trader in his trade, is not an act done in an ordinary course of trade, and therefore is actionable if injury ensue; eighth, an agreement among two or more traders, who are not and do not intend to be partners, but where each is to carry on his trade according to his own free will, except as regards the agreed act, that agreed act being one to be done for the purpose of interfering, *i. e.*, with intent to interfere with the trade of another, is a thing done not in the due course of trade, and is therefore an act wrongful against that other trader, and is also wrongful against the right of the public to have free competition among traders, and is, therefore, a wrongful act against such trader, and, if it is carried out and injury ensue, is actionable; ninth, such

an agreement, being a public wrong, is also of itself an illegal conspiracy, and is indictable.

It follows that in the present case the agreement of 1885 was within the rules (8) and (9) an indictable conspiracy, and that when it was carried out to its immediate and intended effect, which was an injury to the plaintiffs' right to a free course of trade, the plaintiffs had a good cause of action against the defendants.

It follows that the act of the defendants in lowering their freights far beyond a lowering for any purpose of trade—that is to say, so low that if they continued it they themselves could not carry on trade—was not an act done in the exercise of their own free right of trade, but was an act done evidently for the purpose of interfering with, *i. e.*, with intent to interfere with, the plaintiffs' right to a free course of trade, and was therefore a wrongful act as against the plaintiffs' right; and as injury ensued to the plaintiffs, they had also in respect of such a right of action against the defendants. The plaintiff, in respect of that act, would have had a right of action if it had been done by one defendant only; they have it still more clearly when that act was done by several defendants combined for that purpose. For these reasons I come to the conclusion that the plaintiffs were entitled to judgment.

Appeal dismissed.²

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2. The right to use one's economic power over third persons to prevent them employing or dealing with the plaintiff.
(Trade boycotts.)
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LONDON GUARANTEE CO. v. HORN.

Supreme Court of Illinois, 1904. 206 Ill. 493.

MR. JUSTICE SCOTT. As we understand the record in this case, appellee was in the employ of Arnold, Schwinn & Co., a corporation, under a contract terminable by either party at any time, but under which the employment would have continued for an indefinite

²The plaintiff having appealed to the House of Lords, the judgment of the Court of Appeals was affirmed, L. R. 1892, A. C. 25.

See *Park Sons & Co. v. National Druggists*, 175 N. Y. 1 (1903), rebates granted to jobbers, who sold only to such retailers as maintained the selling price fixed by the makers, and *Lough v. Outerbridge et al.*, 143 N. Y. 271 (1894), p. 283, a steamship company granted a twenty-per-cent. reduction of freight to persons shipping exclusively by their vessels, the action was brought, not by a competing line, but by a shipper to whom this reduction was denied, he being the only person shipping goods by other vessels. See the dissenting opinion of Sanborn, J. in *Passaic Print Co. v. Ely & Walker Dry Goods Co.*, 105 Fed. 163, 44 C. C. A. 426 (1900), cited in Note 1 to *Tuttle v. Buck*, *post*. In *Dunshee v. Standard Oil Co.*, 152 Iowa 618 (1911), it was held that the cutting of prices below the point of profitable sale to ruin a competitor and so remove his competition, was actionable, but the defendant had adopted other competitive methods undoubtedly wrongful, such as tampering with the plaintiff's placards, etc.

period had appellant not caused Arnold, Schwinn & Co. to discharge appellee for the purpose of compelling appellee to surrender and release a cause of action which he claimed, and for the satisfaction of which, if it existed, appellant was liable up to the amount of \$5,000, and as a result of which discharge appellee was without employment for several considerable periods, and sustained financial loss and injury consequent upon such discharge.

Under these circumstances, does a cause of action exist in favor of appellee and against appellant? The result of this suit depends upon the answer to this question.

"It is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference."¹

We are of opinion that the contention of appellant in the case at bar, to the effect that competition in trade, employment or business is such a justification, is in accord with the authorities.

In our judgment the cases cited by appellant, in so far as they lend support to its theory, will be found to be cases where the party who secured the discharge of the employee was in some way in competition with that employee in the business or work in which the employee was then engaged, or was a member of some organization which was in competition with the employee or some organization to which that employee belonged, and the fact that such competition existed has been treated by some of the courts as justification for the act of the defendant in bringing about the discharge. In fact, appellant seems to take this view, for it devotes a considerable portion of its argument to an attempt to show that plaintiff and defendant were in competition with each other, in that appellant desired to secure or satisfy the alleged right of action of appellee for the least possible sum, while appellee desired to secure for that right of action the greatest possible sum.² While it is true that the temporal interests of Horn and appellant were involved in the negotiations between them, we believe that the authorities which look upon competition as a justification for the act of one party in securing the discharge of an employee have regarded the term in a more restricted sense, and given to the term "competition" its ordinary meaning and signification. This conclusion is certainly warranted by the reasoning in *Doremus v. Hennessy*, *supra*, where the court

¹ Lord MacNaghten in *Quinn v. Leatham*, L. R. 1901, A. C. 495, p. 510.

² "Counsel seem to have been impelled to this view of the matter by the dissenting opinion of Mr. Justice Holmes in *Vegeahn v. Gunter*, 167 Mass. 92, where, in discussing the proposition that one man may set up a business in competition with another with the intention and expectation of ruining another already engaged in that business in that locality, and if he succeed in his intent is not held to act unlawfully and without justifiable cause, Justice Holmes used this language: 'If the policy on which our law is founded is too narrowly expressed in the term free competition,' we may substitute 'free struggle for life.' Certainly the policy (that of permitting free competition) is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests."

discusses competition as a defense to an action of this character. It cannot be held that appellee and appellant were, in any ordinary sense of the term, in competition with each other. It is also to be observed that the injury which it was sought to visit upon Horn was not primarily to subject him to a deprivation of his employment, but was to compel him to surrender a right not connected with his employment. If the only object of appellant had been to secure appellee's discharge for the purpose of obtaining his position for another, or for the reason that the employment of appellee by Arnold, Schwinn & Co. in some way conflicted with the right of appellant, or some organization to which it belonged, to obtain the same or similar employment, a very different question, and one not now before this court, would be presented, and *Allen v. Flood*, 67 L. J. Q. B. 119, and other cases of that character cited by appellant, would then be worthy of greater consideration.

It is further contended on the part of the appellant, that while the evidence may have shown that it was animated by malice, in the ordinary acceptance of the term, toward Horn, the proof fails to show any legal malice. In this connection it is argued that appellant had the right to have Horn discharged under the terms of the contract, or if it did not have that right, that it seriously and in good faith believed that it had, and that it is thereby relieved of any imputation of malice. There is no provision in the policy which by the wildest stretch of the imagination could be held to give any such right to appellant, and its conduct in attempting to secure a settlement of this claim shows it to have been animated by a wanton disregard of the rights of appellee. He was first told by the attorney of appellant that unless he settled for a trifling amount appellant would have him discharged by Arnold, Schwinn & Co.,—a threat to do that which this attorney must have known his client had no right to do. Afterward Robinett, the agent for the company, made the same threat, and upon his attention being called to the fact that the policy gave him no power to require Horn's discharge, he said to Arnold, Schwinn & Co.: "If you don't discharge him I will have to cancel this policy to-day. I am here to bring this case to a focus to-day, and if you refuse to lay him off I will cancel it." When Mr. Robinett made this threat, which resulted in appellee's discharge, he was making a threat to do an unlawful thing,—to do a thing which appellant, by the terms of the contract, had no right to do. The contract provided only for its cancellation upon five days' notice. It is not pretended that any such notice had been given, but Robinett secured Horn's discharge by threatening to cancel the contract "to-day." We think it perfectly apparent that the attorney for appellant, and its agent, Robinett, each sought to bring about, and finally did bring about, the discharge of appellee by threatening to do acts which each, respectively, knew he had no right to do.

Arnold, Schwinn & Co. had the undoubted right to discharge Horn whenever it desired. It could discharge him for reasons the most whimsical or malicious, or for no reason at all, and no cause

of action in his favor would be thereby created; but it by no means follows that while the relations between Arnold, Schwinn & Co. and Horn were pleasant, and while, as the evidence shows, it was the expectation of the company that Horn would continue in its employ "all the year around," that the interference of appellant, whereby it secured the employer to exercise a right which was given it by the law, but which, except for the action of appellant, it would not have exercised, is not actionable.

In *Chiple v. Atkinson*, 23 Fla. 206, it is said: "From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it, but so long as the former is willing and ready to perform, it is not the legal right, but is a wrong on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it."

Where a third party induces an employer to discharge his employee who is working under a contract terminable at will, but under which the employment would have continued indefinitely, in accordance with the desire of the employer, except for such interference, and where the only motive moving the third party is a desire to injure the employee and to benefit himself at the expense of the employee by compelling the latter to surrender an alleged cause of action, for the satisfaction of which, in whole or in part, such third party is liable, and where such right of action does not depend upon and is not connected with the continuance of such employment, a cause of action arises in favor of the employee against the third party.³

³In *Joyce v. Great Northern R. Co.*, 100 Minn. 225 (1907), the plaintiff, a switchman, of the terminal company, while working in its yards, was injured by an engine of the defendant railway company, which had trackage rights therein. He demanded damages from the railway, which honestly believing that his claim was unfounded, requested that the terminal company should not re-engage him till he released his claim. He refused to do so and was refused re-employment. It was held that he was entitled to maintain an action for damages, under a state statute making it unlawful for any two or more employers to combine or to confer together for the purpose of preventing any person from procuring employment, by threats, promises, blacklisting, or other means. Compare *Raycroft v. Tayntor*, 68 Vt. 219 (1896), where defendant, who was superintendent of a quarry and had quarreled with the plaintiff in regard to the purchase of some standing timber for his employer, notified a third person, who had a license, terminable at will, to cut stone in the quarry, and who employed the plaintiff to assist him therein, that he, the defendant, would terminate the license if the licensee continued to employ the plaintiff on the work. The plaintiff, who in consequence was discharged, was held to have no cause of action. And see *Tennessee Coal and Iron Co. v. Kelly*, 163 Ala. 348 (1909), where the plain-

GRAHAM v. ST. CHARLES STREET RAILROAD CO.

Supreme Court of Louisiana, 1895. 47 La. Ann. 214. 47 La. Ann. 1656.

NICHOLLS, C. J. Defendants' counsel in his brief refers us to the case of *Orr v. Home Mutual Insurance Company et al.*, 12 An. 255, as containing a clear exposition of the principle upon which this defence rests. He says: "Defendants had the legal right to discharge their servants arbitrarily and without cause. The exercise of a legal right gives no cause of action against them. If the plaintiff be injured it is *damnum absque injuria*. No authority has been suggested in opposition to the principle that a man has an undoubted right to employ labor and fix the terms and conditions of that employment in his discretion. In the instant case defendants had the absolute legal right, the exercise of which was proper in the conduct of their business, to prohibit their employees from going to grocery stores or barrooms or from dealing in any way or with any person in such manner as might be prejudicial to the interest of their business. They had the legal right to insist upon abstention in dealing as a condition precedent to their employment or retention in service. If the employees did not see fit to comply with these restrictions they were at liberty to leave the employment. They were not coerced in any sense of the word. They were free agents. They could have continued dealing with plaintiff if they saw fit, but they could not so deal and remain in the employment of the defendant company. Defendants were exercising a legal right."

The issue before us is whether, while the plaintiff, engaged in a lawful business, is legitimately earning his livelihood by and through the custom and patronage of others, the defendants, a corporation, and its foreman, having the power of employing and discharging large numbers of persons, can, without incurring legal liability therefor, without justifiable cause, and moved solely by a malicious and wanton intent and design to injure the plaintiff, use their power of employment and discharge upon persons seeking employment from them, or already in their employ, so as to cause those who are already dealing with the plaintiff to desist from further doing so, and those who would desire to do so from carrying out their wishes by threats of non-employment or discharge. In so doing the defendant

tiff's employer operated a sawmill on the defendant company's property under a terminable arrangement with it, the latter strongly objected to union labor and constantly requested the plaintiff's employer to discharge certain workmen employed by them, including the plaintiff, alleged to be union men and to be interfering with the company's employees. They refused and, friction resulting, terminated the arrangement and abandoned their operation, throwing the plaintiff, who was in fact not a union man, out of employment.

See also, *Mackenzie v. Iron Trades Employers' Ins. Co.*, 1910 Sess Cas. 79 (Scotland), where it was held that it was not actionable wrong for an insurance company to include the plaintiff's name in a published list of persons not to be employed by manufacturers insuring with it against risks under the Workmen's Compensation Act, the plaintiff being thereby deprived of all chance of employment.

would control not only their own will, action and conduct, but forcibly control and change from pure motives of malice the choice and will of others through fear of non-employment or discharge. This will and power of choice, both the plaintiff and the parties themselves are entitled to have left free, and not have coerced, in order simply to work the former, damage and injury.

In *Longshore Printing and Publishing Company v. Howell*, 38 Pacific Reporter, 553, the court said "every man has a right to require that he be protected in his property rights," and quotes approvingly and correctly a citation to the effect that "the labor and skill of the workman or the professional man—be it of high or low degree—the plant of a manufacturer, the equipment of a farmer, the investments of commerce, are all in equal sense property."

In *Delz v. Winfree et al.*, decided by the Supreme Court of Texas, 16 Southwestern Reporter, 112, the court said: "Every man has a right to use the fruits and advantages of his own enterprise, skill and credit. He has no right to be protected against competition, but he has the right to be protected from malicious and wanton interference, disturbance or annoyance. If the disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right, by contract or otherwise, is interfered with.

"But if it comes from merely wanton or malicious acts of others, without the justification of competition or service of any interest or lawful purpose, it then stands upon a different footing."

"In the case at bar defendant has committed the error of enlarging a right into a wrong, and applying to it the maxim '*Neminem laedit qui jure suo utitur.*'"

In dealing with the question before us, we could entirely disregard, as a mere incident or accident of the case, the particular instrumentality by and through which the alleged damage and injury to plaintiff was inflicted. If it was accomplished under circumstances such as to give rise to a legal liability, it would matter little whether it was through the power and influence which an employer can bring to bear upon the conduct and actions of his actual or prospective employees or through some other means.

For the purposes of this opinion, we have taken up and followed the line of discussion and argument adopted and presented by both sides, and passed upon the general legal proposition advanced by plaintiff and disputed by defendant, without subjecting plaintiff's petition as to its exact language and arrangement to the strictest rules of pleading. From that standpoint it is open to some criticism, but we have viewed it as substantially raising the issues presented in the briefs.

We do not undertake to lay down any general rule by which should be ascertained and tested the right of one man to control and direct against his will the action and conduct of another to the injury and prejudice of third persons under the different relations and varying conditions of life. We do not mean for an instant to say that defendants may not, on the trial of this case upon the merits,

justify any conduct which they may have pursued in respect to the plaintiff. We simply say that the whole matter should be thrown open to inquiry and investigation.

In the case of *Delz v. Winfree*, cited above, counsel laid down a proposition which the court said might be conceded as correct, to the effect that "a person has an absolute right to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice or malice, and there is no law which forces a man to part with his title to his property," but it declared that "the privilege here asserted must be limited, however, to the individual action of the party who asserts the right. It is not equally true that a person may from such motives influence another person to do the same. If without such motive, the cause of one person's interference with the property or privilege of another is to serve some legitimate right or interest of his own, he may do acts himself, or cause other persons to do them, that injuriously affect a third party so long as no definite legal right of such third party is violated. In the case of *Walker v. Cronin*, 107 Mass. 562, it was recognized to be a general principle that "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. The intentional causing of such loss to another without justifiable cause, and with malicious purpose to inflict it, is of itself a wrong."

We are of the opinion that the exception of no cause of action should have been overruled and the parties should have been made to go to trial on the merits. It is ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and that the exception of no cause of action filed by the defendant in the District Court be and the same is hereby overruled, and this cause is ordered to be remanded to the lower court for further proceedings according to law.¹

¹ Accord: *Wesley v. Native Lumber Co.*, 97 Miss. 814 (1910), and see *Dapseus v. Lambert*, *Cour d'Appel de Liege*, (Feb. 9, 1898), Sirey 1890, 4, 14, and see *Lewis v. Huie-Hodge Lumber Co.*, 121 La. 658 (1908), § 3 of "Syllabus by the Court"; and Professor James Barr Ames, 18 Harv. L. R. 417.

Contra: *Payne v. Western, etc., R. Co.*, 13 Lea 507 (Tenn. 1884), very similar facts; *Guethler v. Altman*, 26 Ind. App. 587 (1901), a declaration, alleging that a school teacher had maliciously and without cause, by persuasion and intimidation through threats of suspension, prevented the school children from patronizing the plaintiff's shop, was held to show no cause of action; and compare *Heywood v. Tillson*, 75 Maine 225 (1883). See also, *Union Labor Hospital v. Vance Co.*, 158 Cal. 551 (1910), and *Banks v. Eastern Ry., etc., Co.*, 46 Wash. 610 (1907), actions by hospitals against employers refusing to put them on the list of hospitals from which the workmen, if ill or injured, might select one at which he would be treated without further charge, a part of the workmen's wages being deducted from their pay, and the fund so collected paid to the hospitals caring for the workmen, the deduction of wages being obligatory but the workmen free to go to any hospital he liked, though if he went to one not on the list, he would not be entitled to free treatment. In *International, etc., R. Co. v. Greenwood*, 2 Tex. Civ. App. 76 (1893), a curious distinction is drawn be-

The case having been subsequently tried on its merits, a verdict and judgment for one hundred and seventy-five dollars was awarded and the defendants appealed.

MILLER, J. (After holding that the acts of the defendant, Newman, were not within the line of his employment as foreman and that therefore the defendant company was not liable for the harm done by them.) With reference to the foreman we think the case is different. The ground of his liability is that from motives of ill will, by words and conduct, he injured plaintiff's business, by preventing the employees from buying at his store. Our review of the testimony satisfies us that the foreman urged a number of the employees not to deal with plaintiff, threatened them with discharge if they did so; raised the rent of premises he leased to one of the employees who dealt with Graham, assigning that as the cause for the increase; for the same reason, it is our conclusion from the testimony, he gave another tenant of his notice to quit, and as to two instances of discharge, the testimony strongly points for the cause to the fact that the discharged men bought of plaintiff. We have given attention to that of the foreman, that he never gave orders to the men not to deal with plaintiff, and that his motive was to prevent drinking by the men during the hours of service. We have considered the testimony of the employees, produced by the defendant, that they dealt with plaintiff and were not discharged; that there were posted in the station stringent rules against drinking by the employees, but a careful consideration of the testimony impresses us, as we must conclude it did the jury, that the defendant did use efforts to divert employees from dealing with the plaintiff, and that his motive was not to enforce the rules or discipline of the company.²

The fact that the defendant's tenant had a grocery in the neighborhood, apt to be benefited by a diversion of plaintiff's customers, supplies the motive of interest, but does not, in our view, at all mitigate his conduct. With all reasonable allowance for the competitions of trade and the means by which the shopkeeper or merchant obtains business, words and actions to discredit it and injure a rival in business can not be tolerated.³ The circumstance that the de-

tween threats to discharge an employee if he patronizes the plaintiff's saloon, which, if effective, are said to be actionable, and the giving of notice that the defendant would not employ any one who did so, which was held to be within his legal rights.

²Had such been his motive, his efforts to prevent his employees from dealing with the plaintiff would have been justified, if the means used were not in themselves wrongful, *Reding v. Kroll*, *Trib de Luxembourg* (Oct. 2, 1896), *Sirey* 1898, 4, 16, defendant held justified in forbidding his employees, under pain of discharge, from frequenting the plaintiff's saloon, because of its demoralizing effect on them; *Gott v. Berea College*, 161 S. W. 204 (Ky. 1913), trustee of a college, largely supported by charity and designed to furnish education to persons of small means, forbade the students, under penalty of expulsion, "entering eating houses or places of amusement not under the control of the college"; *Jones v. Cody*, 132 Mich. 13 (1902).

³*Contra: Robison v. Texas Pine Land Assn.*, 40 S. W. 843 (Tex. Civ. App. 1897), where it was held not actionable for the defendant, who main-

defendant as the foreman of the company had the power to discharge those designed to be influenced by his communications or statements with respect to the plaintiff, and that defendant had the selection of the labor of the company, tended to make more effective his efforts to injure plaintiff in his business. We recognize the principle urged by the defence, that the employer has the right to employ those he chooses, and the same liberty is allowed as to their discharge. The authority cited by defendant is entitled to full recognition, that one may do business with those he chooses to deal with, and decline, if he pleases, the business of others. *Orr v. Insurance Co.*, 12 An. 255. It is not the exercise of defendant's choice in selecting or discharging laborers for the company that makes him liable, but he is responsible, because, in exercising that right, he indulges in language, uses threats, and pursues a line of conduct all directed at the plaintiff, and of a character to injure him in his lawful business.

It is therefore ordered, adjudged and decreed that the judgment of the lower court against the company be avoided and reversed, and that the judgment against Thomas Newman be affirmed, and that he pay costs.

MACAULEY BROTHERS v. TIERNEY.

Supreme Court of Rhode Island, 1895. 19 R. I. 255.

MATTESON, C. J. The complainants proceed on the theory that they are entitled to protection in the legitimate exercise of their business; that the sending of the notices to wholesale dealers not to sell supplies to plumbers not members of the association, under the penalty, expressed in some instances and implied in others, of the withdrawal of the patronage of the members of the associations in case of a failure to comply, was unlawful, because it was intended injuriously to affect the plumbers not members of the association in the conduct of their business, and must necessarily have that effect. It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law and makes it

tained a "company store," to threaten to discharge its employees if they patronized the plaintiff's competing store and to warn them that their non-transferable pay checks would not be honored if they passed through the plaintiff's hands for goods bought of him; *Lewis v. Huie-Hodge Lumber Co.*, 121 La. 658 (1908), threats to discharge employees who patronized the plaintiff's store run in competition with the defendants' "company store," distinguishing the principal case on the ground that the defendant Newman "had no legal right to exert the power of his official position over the employees of his employer for his own private advantage, to the prejudice of (the plaintiff) Graham" and because the men on whom he exerted the pressure "were not his own employees but those of the railroad company, whom he had only the right to discharge or refuse to employ for reasons connected with the business and interests of that company."

actionable. If, therefore, there is a legal excuse for the act it is not wrongful, even though damage may result from its performance. The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse in legal contemplation for the sending of the notices?

We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival and attracting it to himself is an act intentionally done and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction or molestation of the rival or his servants or workmen, and the procurement of violation of contractual relations, are instances. A leading and well considered case on this subject was the *Mogul Steamship Co. v. McGregor*. (The opinion then discusses that case and quotes from the opinion of Bowen L. J. therein.) The case at bar contains no element of the character of those enumerated by the Lord Justice which are forbidden by law, unless the threat of the withdrawal of patronage may be considered as amounting to coercion. We do not think, however, that such a threat can be regarded as coercive within a legal sense; for, though coercion may be exerted by the application of moral as well as physical force the moral force exerted by the threat was a lawful exercise by the members of the associations of their own rights, and not the exercise of a force violative of the rights of others as in the cases cited by the Lord Justice. It was perfectly competent for the members of the association, in the legitimate exercise of their own business to bestow their patronage on whomsoever they chose, and to annex any condition to the bestowal which they saw fit. The wholesale dealers were free to comply with the condition or not, as they saw fit. If they valued the patronage of the members of the associations more than that of the non-members, they would doubtless comply; otherwise they would not.

Closely analogous to the case at bar was the recent case of *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223. The plaintiff was a manufacturer and seller of lumber, having a large and profitable trade, both wholesale and retail, in Minnesota and the adjoining States. The defendants, comprising from twenty-five to fifty per cent. of the retail lumber dealers in the States referred to, many of whom were or had been customers of the plaintiff, formed an association under the name of the North Western Lumbermen's Association,

for the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers not dealers at any point where a member of the association was carrying on a retail yard. The by-laws provided that any members of the association doing business in the town to which lumber thus sold by a manufacturer or wholesale dealer had been shipped should notify the secretary of the association, within thirty days after the arrival of the shipment at its destination, who should thereupon notify the manufacturer or wholesale dealer by whom the shipment had been made that he had a claim against him for ten per cent. of the value of such sale at the point of shipment; that if the secretary should be unable to obtain payment he should refer the matter to the directors, who should hear and determine the claim; that if the manufacturer or dealer refused to abide by the decision of the directors, it should be the duty of the secretary to immediately notify the members of the association of the name of the manufacturer or dealer and that he refused to comply with the rules of the association; that if any member continued to deal with such manufacturer or wholesale dealer he should be expelled from the association; that whenever the secretary of the association should succeed in collecting any such claim, the sum collected should be paid to the member or members, in equal shares, doing business at the place of the sale. The plaintiff sold two bills of lumber directed to consumers or contractors at points where members of the association were engaged in business. The secretary of the association, having been informed of the fact, notified the plaintiff, in pursuance of the provision of the by-laws, that he had a claim against him for ten per cent. of the amount of the sales. Considerable correspondence with reference to the matter ensued, in which the plaintiff from time to time promised to adjust the claim, but procrastinated and avoided doing so until finally the secretary threatened unless the claim was immediately settled to send the notice provided by the by-laws to all the members of the association. Thereupon the plaintiff brought its suit for an injunction. An *ex parte* injunction having been granted, the defendants obtained an order for the complainants to show cause why it should not be dissolved. The court refused to dissolve the injunction, but on appeal the order continuing the injunction was reversed. The court says, "Now, when reduced to its ultimate analysis, all that the retail lumber dealers in this case have done is to form an association to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other non-dealers at points where a member of the association is engaged in the retail business. The means adopted to affect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any

such sale. That is the head and front of defendant's offence. It will be observed that defendants were not proposing to send notice to any one but members of the association. There was no element of fraud, coercion, or intimidation, either towards the plaintiff or the members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on plaintiff for ten per cent. on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of non-dealers at the same points, it would probably conclude to pay; otherwise not. It cannot be claimed that the act of making this demand was actionable; much less that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. Nor was any coercion proposed to be brought to bear on the members of the association to prevent them from trading with the plaintiff. After they received the notice, they would be at entire liberty to trade with plaintiff or not, as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff they were liable to be 'expelled;' but this simply meant to cease to be members. It was wholly a matter of their own free choice which they preferred,—to trade with the plaintiff or to continue members of the association." See also *Paine v. Western & Atlantic R. R. Co.*, 81 Tenn. 507, 514-519; *Cote v. Murphy*, 159 Pa. St. 420, 421; *Heywood v. Tillson*, 75 Me. 225, 233.

It only remains to notice the charge of conspiracy contained in the bill, upon which considerable stress has been laid as though the fact that the action of the members of the associations was in pursuance of a combination entitled the complainants to relief. To maintain a bill on the ground of conspiracy, it is necessary that it should appear that the object relied on as the basis of the conspiracy, or the means used in accomplishing it, were unlawful. What a person may lawfully do a number of persons may unite with him in doing without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful. The object of the members of the association was to free themselves from the competition of those not members, which, as we have seen, is not unlawful. The means taken to accomplish that object were the agreement among themselves not to deal with wholesale dealers who sold to those not members of the associations, and the sending of notices to that end to the wholesalers. This, as we have also seen, was not unlawful. Hence, it follows that, as the object of the combination between the members of the association was not unlawful, nor the means adopted for its accomplishment unlawful, there is no ground for the charge of conspiracy, and the fact of combination is wholly immaterial.¹

¹ Accord: *Scottish Co-operative Wholesale Society v. Glasgow Fleshers' Assn.*, 35 Scottish L. Reporter 645 (1898), an association of wholesale butchers notified auctioneers that they would bid at no sale, at which bids from co-operative stores were received, in consequence the auctioneers re-

JACKSON v. STANFIELD *et al.**Supreme Court of Indiana, 1893. 137 Ind. 592.*

The special findings of fact showed in substance that the plaintiffs, Newton Jackson and his wife Martha, were engaged in the business of buying and selling lumber sometimes on their own account, sometimes on commission, that they had no lumber yard or stock on hand in the place where they did business. That the defendants and other lumber dealers, about one hundred and fifty in number, formed an association having by-laws which provided, *inter alia* (1) that any lumber dealer owning or operating a lumber yard,

fused to receive bids from such stores. Recovery of damages was denied since the Fleshers "did not act wholly from malice but at least in part from a regard to their own interest;" *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611 (1902), defendants, to increase the trade of a pipe line owned by them, refused to buy or refine oil shipped by the plaintiffs' competing line or to permit, by means not stated, others to do so, or to lease oil lands to persons who so shipped; *Continental Ins. Co. v. Board of Fire Underwriters of the Pacific*, 67 Fed. 310 (1895), threats to dismiss agent unless he represented exclusively the companies who were members of the board—threats to "boycott," by means not stated, customers of the plaintiff, were, however, held to be illegal; *Roseneau v. Empire Circuit Co.*, 131 N. Y. App. Div. 429 (1909), defendant, a corporation owning the principal burlesque theaters in the most important towns, refused to book shows which did not agree to appear only at its theaters, thus preventing the plaintiff, an independent theater, from booking shows and causing burlesque companies already under contract with it to break such contracts, see also, *Russell v. New York Produce Exchange*, 58 N. Y. S. 842 (1899), and *Park & Sons Co. v. National Wholesale Druggists' Assn.*, 175 N. Y. 1 (1903), where manufacturers, wholesalers and jobbers combined to prevent price cutting by agreeing that rebates would be given to jobbers who, as members of their association, agreed to sell and sold only to dealers who maintained prices, all other jobbers or dealers being allowed to buy but receiving no rebate. In *Lewis v. Huie-Hodge Co.*, 121 La. 658 (1908), it was held that the defendant was not guilty of actionable wrong toward the plaintiff, whose store competed with its "company store," in threatening persons selling to the plaintiff that they would not buy from them unless they ceased to do so.

The right to refuse, alone or in concert with others, to deal with any one, for any or no reason, is strongly asserted in *Reynolds v. Plumbers' Assn.*, 30 Misc. (N. Y.) 709 (1900), where the defendant sent to its members a notice not to sell or credit to the plaintiff, in pursuance of a by-law which forbade, under penalty of expulsion, members to give credit to a customer of any member who had refused to settle a claim of such member, or in case of dispute, to give the association the reasons for his refusal or submitted the controversy to arbitration, and *Brewster v. Miller*, 101 Ky. 368 (1897), where the by-laws of an association of all the undertakers in Louisville, forbidding its members, under penalty of expulsion, from serving any one against whom any member had an unpaid claim, the plaintiff was unable to procure the services of an undertaker for the burial of his wife, it was held that no action lay, though had the plaintiff paid the claim, it not being due and owing, in order to procure such services he could have recovered it back in an action of *indebitatus assumpsit* as money "tortiously" obtained, compare *Schulten v. Bavarian Brewing Co.*, 96 Ky. 224 (1894), where, as in *Ulery v. Chicago Live Stock Exchange*, 54 Ill. App. 233 (1894), there was no allegation of any by-law, threatening with expulsion or other penalty a member of the combination or association breaking the agreement or disobeying the direction not to deal with the plaintiff because he had not paid a member's claim, and where it is inti-

in which a stock of lumber commensurate with the local demand is kept for sale, is eligible for membership but forfeits his membership when he ceases to keep such stock. (2) That any manufacturer or wholesale dealer may become an honorary member, forfeiting such membership if he violates the rules of the association. In section 3, that whenever any manufacturer or wholesale dealer shall sell lumber to any person not a member of the association, any member doing business in the place to which the shipment is made may notify such manufacturer, etc., that he has a claim against him for such shipment. "If the parties cannot adjust it, it is made the duty of the member to notify the secretary of the facts in the case, who shall refer the matter to the executive committee, whose duty it is to hear the grievances and determine the claim. If the wholesaler or manufacturer ignores the decision of the committee, it is the duty of the secretary to notify the members of the association of the name of the person so offending and of the members to no longer patronize him. If they continue to deal with the offender they shall be expelled from the association, and if any member refuses to abide by the decision of the executive committee his name is to be stricken from the membership of the society. They also showed that the West Michigan Lumber Co. having sold to the plaintiffs was fined \$100, which after considerable correspondence it paid, and thereafter refused to sell to the plaintiffs.

DAILEY, J. This is an action brought by the appellants against the appellees for damages and for relief by injunction, on the ground that the defendants had entered into an unlawful combination for the purpose of injuring the appellees in their business, and that, in consequence thereof, plaintiffs had suffered actual damage, and were threatened with great loss in their business.

By request of the parties, the court below made a special finding of the facts, and stated its conclusion of the law thereon, and the plaintiffs were not entitled to recover.

There was no motion for a new trial, and the only questions presented by the record are these:

_____mated that such a combination to force the plaintiff to pay a claim not justly due would be wrongful.

Compare with the principal case, *Orr v. Home Mutual Ins. Co.*, 12 La. Ann. 255 (1857), demurrer sustained to a declaration alleging that certain insurance companies had conspired to refuse, maliciously and without any cause other than the freight rates charged by the plaintiff, to insure anything in any steamboat employing him, whereby he was discharged from his berth as captain of a certain boat and was unable to obtain other employment; and with *Bohn Mfg. Co. v. Hollis*, compare *Hunt v. Simonds*, 19 Mo. 583 (1854), demurrer sustained to a declaration alleging a similar conspiracy for the purpose of ruining the plaintiff in his business of steamboat owner, by refusing to insure his boat, and *Baker v. Metropolitan Life Ins. Co.*, 64 S. W. 913 (Ky. 1901), and *Trimble v. Prudential Life Ins. Co.*, 64 S. W. 915 (1901), in each of which the plaintiff, an employee at will, was discharged by an insurance company in pursuance of an agreement between such companies that no one of them would employ any person within two years of the time when he had left the service of any other. The agreement, it was said, being against public policy and not obligatory, the act of the plaintiff's employer in discharging him was voluntary.

First. Whether the plaintiffs are entitled to an injunction?

Second. If not entitled to an injunction, are they entitled to recover damages?

The facts found by the court disclose that the appellees, as members of the combination complained of, availed themselves of the means provided for in section three to destroy the business of the appellants as brokers in lumber, because they were not retail dealers within the definition of the term, and that they effectuated their purpose.

The special findings of fact clearly show it to be a compact to suppress the competition of those dealers who did not own yards, with an adequate stock on hand, by driving them out of business. By this plan they reach the wholesale dealer, and compel him to pay an arbitrary penalty under a threat of financial injury, and they force him to assist in ruining the dealer who does not own a yard.

There is such an element of coercion and intimidation in the by-law under consideration, towards the wholesale dealers, manufacturers, and even the members of the society, and such provision made for penalties and forfeitures against them, that it will not do to say it was optional with the wholesale dealer whether it would pay the demand or not, or that it was left to the discretion or choice of the members to either trade with the wholesaler or abandon the association. A conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of any one by wrongfully preventing those who would be customers from buying anything from the representatives of such business, by threats or intimidation, is in restraint of trade and unlawful.

The great weight of authority supports the doctrine that where the policy pursued against a trade or business is of a menacing character calculated to destroy or injure the business of the person so engaged, either by threats or intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil action for damages therefor. It is not a mere passive, let-alone policy; a withdrawal of all business relations, intercourse, and fellowship that creates the liability, but the threats and intimidation shown in the complaint.

The learned counsel for the appellees, in their very able brief, contend that the plaintiffs were only incidentally injured by the acts of the defendants in enforcing a penalty of \$100 against the West Michigan Lumber Company.

It will be observed that the Retail Lumber Dealers' Association invites wholesalers to become honorary members, and that said lumber company is an honorary member. But the rules of the association do not affect alone members, active and honorary. They extend to and reach any wholesale dealer in the United States with whom the threat to withdraw the trade of 150 retail dealers can have weight.

It is shown in the finding that Michigan is the source from which most of the lumber in Northern Indiana is procured, and that

the rules of the association are published in pamphlet form and sent to every wholesale dealer in the United States. The retail dealers who organized the association in question, are members of the various cities and towns where they are located. They have lumber yards containing stock in quantity and quality suited to and commensurate with the wants of the consumers in their several localities. These gentlemen are prominent, wealthy, and influential citizens of our State, whose power, from the elevated stations they occupy, so exercised, enables them to control the wholesale dealers of the United States against the agents and brokers within their own territory, and effectually drive them out of business. It is idle to say that the victim of such a combination is only "incidentally" affected thereby. The object of the association, and the result attained, is monopoly of the trade by owners of yards, and the broker is simply ignored by the wholesale dealers.

It is not in point to cite cases where men voluntarily agree to observe rules adopted by themselves. This is no voluntary affair of the wholesale dealers. It is not even a combination of wholesalers. They may, and do, sometimes become honorary members, so as to keep within touch of the retail dealers and secure trade. It is, as stated, an association of retailers to restrict the liberty of wholesalers to sell to customers and brokers, and the wholesalers must obey or lose their trade.

It is found, as a fact, that the market in which the plaintiffs could most profitably buy was in Michigan. Freight and railroad facilities necessarily limit the field.

It is also found that the West Michigan Lumber Company is the dealer that made the plaintiffs' trade most profitable, and that, for fear of the penalties, this company and another refused to deal with them. The West Michigan Lumber Company was willing and anxious to sell to the plaintiffs until fined by the defendants and mulcted in the sum of one hundred dollars, when it refused to make further sales for the reason that it was afraid of the penalties. Such rules contravene the rights of non-members to earn their living by fair competition.

The case of *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, is cited by appellees as sustaining the decision of the lower court. The opinion proceeds upon the theory that there was no element of coercion or intimidation in the acts complained of, but we think the decision in this respect is in conflict with approved authority, and is bad as a precedent.

The judgment is reversed, with instruction to restate conclusions of law, and render judgment upon the special findings in favor of the appellants for five hundred and eighty-three dollars, and with the further instruction to render a judgment perpetually enjoining the defendants from in any way, other than by fair, open competition, interfering with the plaintiffs in their business, and from demanding a penalty or making a claim against any one, under the

by-laws of said association, who may sell to the plaintiffs, or through them to a consumer.¹

COTE v. MURPHY.

Supreme Court of Pennsylvania, 1894. 159 Pa. St. 420.

MR. JUSTICE DEAN. The defendants were members of the Planing Mill Association of Allegheny county, and Builders' Exchange of Pittsburgh. The different partnerships and individuals composing these associations were in the business of contracting and building and furnishing building material of all kinds. On the 1st of May, 1891, there was a strike of the carpenters, masons and bricklayers in the building trades, bringing about, to a large extent, a stoppage of building.

The men demanded an eight-hour day, with no reduction in wages theretofore paid, which the employers refused to grant; then a strike by the unions of the different trades was declared. The plaintiff, at the time, was doing business in the city of Pittsburgh as a dealer in building materials. He was not a member of either the "Planing Mill Association," or of the "Builders' Exchange;" there were also contractors and builders, who belonged to neither of these organizations, who conceded the demands of the workmen; they sought to secure building material from dealers wher-

¹ In *Doremus v. Hennessy*, 176 Ill. 608 (1898), *accord, semble*, the language used by the court was broader than was required for the decision of the case, the effect of the defendant's conduct being to cause persons bound to the plaintiff by contracts to refuse to perform them.

Combinations to refuse to deal with or to prevent or induce others to deal with persons not members thereof, with the object of controlling the price of the commodity dealt in, have been held actionable at law in *Walsh v. Association of Master Plumbers*, 97 Mo. App. 280 (1902), and *Ertz v. Produce Exchange*, 82 Minn. 173 (1901), under statutes making contracts, etc., in restraint of competition, etc., unlawful; and in *Hawarden v. Youghioghenny & Lehigh Coal Co.*, 111 Wis. 545 (1901), an independent coal dealer recovered damages against wholesale dealers, who, having a practical monopoly of coal at Superior, combined with retailers to maintain a fixed retail price by refusing to sell to retailers who, like the plaintiff, cut the price, under a statute making persons combining to injure others liable civilly and criminally; see *State v. Huegin*, 110 Wis. 189 (1901), holding the act constitutional, construing it to include combinations to stifle competition and holding that the fact that the object was to advance the interests of those combining constituted no justification.

In *Wyeman v. Deady*, 79 Conn. 414 (1906), it was held that an action lay by a non-union workman against a labor union and its walking delegate, who by threat of strike had procured his discharge because he was not a member of the union, under a statute making it a criminal offense to threaten or use any means to intimidate any person to compel him to do or abstain from doing anything which such person has the right to do, which had been construed in *State v. Glidden*, 55 Conn. 46 (1887), to make it criminal a strike to procure a fellow workman's discharge.

Contra: Breuster v. Miller's Sons Co., 101 Ky. 368 (1897), holding that, while a somewhat similar statute made such a contract or agreement unenforceable and subjected the parties to it to indictment, it gave no private right of action at law or equity to those injured thereby; see also, *Downes v. Bennett*, 63 Kans. 653 (1901). An individual aggrieved by a violation of the "Sherman Anti-Trust Act" can not sue for an injunction, such remedy being available to the government alone, his sole remedy is the right provided therein to sue for threefold damages, *National Fireproofing Co. v. Mason Builders' Assn.*, 169 Fed. 259 (1909).

ever they could, and thus go on with their contracts; if they succeeded in purchasing the necessary material, the result would be, that at least some of the striking workmen would have employment at a higher rate of wages than the two associations were willing to pay; the tendency of this was to strengthen the cause of the strikers, for those employed were able to contribute to the support of their fellow workmen who were idle. The two associations already named, sought to enlist all concerned as contractors and builders or as dealers in supplies, whether members of the associations or not, in furtherance of the one object, resistance to the demands of the workmen. The plaintiff, and six other individuals or firms engaged in the same business, refused to join them, and undertook to continue sales of building material to those builders who had conceded the eight-hour day. The Planing Mill Association and Builders' Exchange tried to limit their ability to carry on work at the advance, by inducing lumber dealers and others to refrain from shipping, or selling them in quantities, the lumber and other material necessary to carry on the retail business; in several instances, their efforts were successful, and the plaintiff did not succeed in purchasing lumber from certain of the wholesale dealers in Cleveland and Dubois, where he wanted to buy. The defendants were active members of one or other or both of the associations engaged in the contest with the striking workmen. The strike continued about two months; after it was at an end, the plaintiff brought suit against the defendants, averring an unlawful and successful conspiracy to injure him in his business, and to interfere with the course of trade generally, to the injury of the public; that the conspiracy was carried on by a refusal to sell to him building materials themselves, and by threats and intimidation preventing other dealers from doing so. Under the instructions of the court upon the evidence, there was a verdict for the plaintiff in the sum of \$2,500, damages, which the court reduced to \$1,500; then judgment, and from that defendants take this appeal.

The plaintiff's case is not one which appeals very strongly to a sense of justice.

"The reason of the law is the life of the law," and, as given in the cases cited by appellee, irresistibly impels to the conclusion that the combination here was not unlawful;¹ a conclusion which is clearly indicated

¹The following extracts from the opinion sufficiently show the reasoning by which the conclusion was reached:

"The mechanics of Pittsburgh, engaged in the different building trades, on 1st of May, 1891, demanded that eight hours should be computed as a day in payment of their wages. Their right to do this is clear. It is one of the indefeasible rights of a mechanic or laborer in this commonwealth to fix such value on his services as he sees proper, and, under the constitution, there is no power lodged anywhere to compel him to work for less than he chooses to accept. But in this case the workmen went further; they agreed that no one of them would work for less than the demand, and by all lawful means, such as reasoning and persuasion, they would prevent other workmen from working for less. Their right to do this is also clear. At common law, this last was a conspiracy and indictable, but under the acts of 1869, 1872, 1876 and 1891, employees, acting together by agreement, may, with a few exceptions, lawfully do all those things which the common law declared a conspiracy. The employers, contractors and others, engaged in building and furnishing supplies, members of the two associations already mentioned, to which these defendants belonged, refused to concede the demands of the workmen, and there then followed a prolonged and bitter contest. The

in *Com. v. Carlisle* (Brightly's R. 39), that it would not be unlawful, if there was first recurrence to artificial means by workmen to raise the market price. Here, the step provocative of a combination by the employers, was an attempt by lawful, artificial means on the part of the workmen to control the supply of labor, preparatory to a demand for an advance.

Nor does the fact that the appellee was not a workman or a member of any of the unions of workmen, put him in any better attitude than if he were. He undertook for his own profit to aid the cause of the workmen; his right so to do was unquestionable. But, if the employers by a lawful combination could limit his ability so to do, they did not make themselves answerable in damages to him for the consequences of a lawful act.

But if the agreement itself were not unlawful, were the methods to carry it out unlawful? If the employers' combination here had used illegal

members of the association refused to furnish supplies to those engaged in the construction of any building where the contractor had conceded the eight-hour day. This, as individual dealers, they had a clear right to do. They could sell and deliver their material to whom they pleased. But they also went further; they agreed among themselves that no member of the association would furnish supplies to those who were in favor of or had conceded the eight-hour day, and that they would dissuade other dealers, not members of the associations, from furnishing building material to such contractors or retail dealers; to the extent of their power, this agreement was carried out. This clearly was combination, and the acts of assembly referred to do not, in terms, embrace employers; they only include within their express terms workmen; hence, it is argued by counsel for appellee, these defendants are subject to all the common-law liability of conspirators in their attempts to resist the demand for increased wages; that is, there can be a combination among workmen to advance wages, but there can be no such combination of employers to resist the advance; that which by statute is permitted to the one side, the common law still denies to the other. Before any legislation on the question, it was held that a combination of workmen to raise the price of labor, or of employers to depress it, was unlawful, because such combination interfered with the price which would otherwise be regulated by supply and demand; this interference was in restraint of trade or business, and prejudicial to the public at large. Such combination made an artificial price; workmen, by reason of the combination, were not willing to work for what otherwise they would accept; employers would not pay what otherwise they would consider fair wages. Supply and demand consist in the amount of labor for sale and the needs of the employer who buys. If more men offer to sell labor than are needed, the price goes down and the employer buys cheap; if fewer than required offer, the price goes up and he buys dear; as every seller and buyer is free to bargain for himself, the price is regulated solely by supply and demand. On this reasoning was founded common-law conspiracy in this class of cases. But, in this case, the workmen, without regard to the supply of labor or the demand for it, agree upon what in their judgment is a fair price, and then combine in a demand for payment of that price; when refused, in pursuance of the combination, they quit work, and agree not to work until the demand is conceded; further, they agree by lawful means to prevent all others, not members of the combination, from going to work until employers agree to pay the price fixed by the combination. And this, as long as no force was used or menaces to person or property, they had a lawful right to do. And so far as is known to us, the price demanded by them may have been a fair one. But it is nonsense to say that this was a price fixed by supply and demand; it was fixed by a combination of workmen on their combined judgment as to its fairness; and, that the supply might not lessen it, they combined to prevent all other workmen in the market from accepting less. Then followed the combination of employers, not

methods or means to prevent other dealers from selling supplies to plaintiff, the conspiracy might still have been found to exist. The threats referred to, although what are usually termed threats, were not so in a legal sense. To have said they would inflict bodily harm on other dealers, or vilify them in newspapers, or bring on them social ostracism, or similar declarations, these the law would have deemed threats, for they may deter a man of ordinary courage from the prosecution of his business in a way which accords with his own notions; but to say, and even that is inferential from the correspondence, that if they continued to sell to plaintiff the members of the association would not buy from them, is not a threat. It does not interfere with the dealer's free choice; it may have prompted him to a somewhat sordid calculation; he may have considered which custom was most profitable, and have acted accordingly; but this was not such coercion and threats as constituted the acts of the combination unlawful: *Rodgers v. Duff*, 13 Moore, P. C. 209; *Bowen v. Matheson*, 14 Allen, 499; *Bohn Manufacturing Co. v. Hollis, et al.*, 54 Minn. 223.

to lower the wages theretofore paid, but to resist the demand of a combination for an advance; not to resist an advance which would naturally follow a limited supply in the market, for the supply, so far as the workmen belonging to the combination were concerned, was by combination wholly withdrawn, and as to workmen other than members, to the extent of their power, they kept them out of the market; by artificial means, the market supply was almost wholly cut off. The combination of the employers, then, was not to interfere with the price of labor as determined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price, as regulated by the supply. The element of an unlawful combination to restrain trade because of greed of profit to themselves, or of malice towards plaintiff or others is lacking, and this is the essential element on which are founded all decisions as to common-law conspiracy in this class of cases. And however unchanged may be the law as to combinations of employers to interfere with wages, where such combinations take the initiative, they certainly do not depress a market price when they combine to resist a combination to artificially advance price."

It was also held that the element of "real damage" to the plaintiff was absent, the court saying: "by far the larger number of dealers in the city and county were members of the combination which refused to sell; only the plaintiff and six others refused to enter the combination; the result was that these seven had almost a monopoly of furnishing supplies to all builders who conceded the advance. Plaintiff admits in his own testimony that thereby his business and profits largely increased; in a few instances he paid more to wholesale dealers and put in more time buying than he would have done if the associations had not interfered with those who sold him; but it is not denied that, as a result of the combination, he was individually a large gainer. True, he avers that, if defendants had gone no further than to refuse to sell themselves, he would have made a great deal more money; that is, he did not make as large a sum as he would have made if they had not dissuaded others, not members of the association, from selling to him; but that, by the fact of the combinations and strike, he was richer at the end than when they commenced, is not questioned."

"We then have these facts, somewhat peculiar in the administration of justice: A plaintiff suing and recovering damages for an alleged unlawful act, of which he himself, in so far as he aided the workmen's combination, is also guilty, and both acts springing from the same source, a contest between employers and employed as to the price of daily wages; and then the further fact, that this contest, instead of damaging him, resulted largely to his profit."

BROWN & ALLEN v. JACOBS' PHARMACY CO.

Supreme Court of Georgia, 1902. 115 Ga. 429.

Appeal from an injunction granted by Lumpkin, J., Fulton, Superior Court.

FISH, J. The record in this case discloses that, prior to the institution of the present action and since then there existed in the United States three organizations, known respectively as the Proprietary Association of America, the National Wholesale Druggists Association, and the National Association of Retail Druggists. These associations, occupying each toward the others close and intimate relations, had, among other things, the purpose of keeping up the prices of proprietary medicines, drugs, and other articles usually dealt in by those engaged in the drug trade. A local association was formed in Atlanta, known as the Atlanta Retail Druggists Association. When it was first organized, Joseph Jacobs, secretary and treasurer of the Jacobs' Pharmacy Co., the plaintiff in the present case, was a member of it, but at that time it was distinctly understood and agreed among its members that it was to undertake no action with reference to the cutting of prices by dealers in drugs, or to control prices of the same. In consequence of charges brought against him as to his advertising methods, etc., the complainant withdrew from the association. Some of the members of the association were members of one or more of the large associations above referred to. After the retirement of Jacobs, the local concern put in operation a scheme to prevent the Pharmacy Co. from being able to buy goods with which to conduct its business. The main features of the scheme were, that the local concern, by circulars, letters, or otherwise, undertook to notify wholesalers and manufacturers throughout the country that the Pharmacy Co. was an aggressive cutter, and to request the persons or concerns addressed not to sell it any more goods; further, to require all salesmen representing the manufacturers or wholesale houses to procure from the local association a card, in order to procure which such salesmen had to sign an agreement not to sell the Pharmacy Co. any goods; and another part of the scheme was to give the manufacturers and wholesalers to understand that, unless they refused to sell the plaintiff any goods, the members of the local association would not buy any more goods from them. In this condition of affairs the plaintiff brought its equitable petition against the defendants, alleging, in substance, the facts set forth above, and praying for damages for alleged injuries to its business already done, and for an injunction to prevent the defendants from carrying into effect the scheme above outlined. The petition charged that the scheme was an unlawful conspiracy to destroy the plaintiff's business; and it more fully set out the manner in which this scheme was to be effectuated, by setting forth, as exhibits marked, A, B, and C, certain letters, etc., by means of which the defendants were seeking to accomplish the alleged unlawful purpose which the plaintiff was seeking to restrain. These ex-

hibits were in substance as follows: A circular letter written by the defendants' association to wholesalers, after stating that there were fifty-eight retailers in the association and only one price "cutter" and expressing its belief that they would prefer the support of the former to that of the "cutter," called attention to an enclosed resolution of the association requiring that salesmen with whom the association shall make purchases shall have cards which were issued only by them, or the wholesalers or manufacturers whom they represent sign an agreement, enclosed in the letter, binding them to sell only to members of the defendants' association and others who have not been designated as aggressive price cutters.

A conspiracy has been defined as a combination either to accomplish an unlawful end, or to accomplish a lawful end by unlawful means. The terms "criminal" and "civil" are used respectively to designate a conspiracy which is indictable or a conspiracy which will furnish ground for a civil action. To render a conspiracy indictable at common law, no overt acts in carrying out the design of the conspirators was necessary. The conspiring was sufficient to authorize an indictment. Yet it will be readily perceived that, if the conspirators stopped with conspiring, and did nothing further in execution of the design, no injury would have been done which would furnish a basis for a civil action. But if, in carrying out the design of the conspirators, overt acts were done, causing legal damage, the person damaged had a right of action. *Saville v. Roberts*, 1 Ld. Raym. 378. Hence arose the dictum that the gist of criminal conspiracy is the combination, and the gist of civil conspiracy is the injury or damage.

It is suggested, inasmuch as the evidence shows that not all of the druggists of Atlanta are members of the local association, but only about three-fourths of them, that the combination or agreement was not obnoxious to this rule, or the rule declaring agreements or contracts tending to monopoly, against public policy, even if it would have been so were all members. We do not think this distinction sound. Nothing is more common than for the courts to declare contracts between only two persons, who by no means control a particular kind of business, void as contrary to public policy.¹ It is the nature or character and tendency of the agreement which renders it objectionable, whether in fact the parties to it succeed in restraining trade generally, or stifling competition, or not. As to the matter of monopoly, it may also be said that if parties make contracts or agreements seeking to establish a monopoly, and do establish it as far as they can, surely they cannot say that the effort is legal if not completely successful.

¹Citing *Bailey v. Master Plumbers' Assn.*, 103 Tenn. 99 (1899), a combination of master plumbers similar to that in *Macaulay v. Tierney*, was held so far illegal that no action lay to recover penalties for violation of its by-laws. "The individual right is radically different from the combined action. The combination has hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public. The difference in legal contemplation between

In *Moore v. Bennett* (Ill. 1892), 15 L. R. A. 361, it was held that an association of stenographers of which one object was to control the prices to be charged for stenographic work by its members, by restraining all competition between them, was an illegal combination, although only a small portion of the stenographers of the city belonged to it. In the opinion Bailey, J., says (p. 364): "Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its good will with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased."

The next position of the defendants, and one which, on first presentation, seems to be their strongest defense on this part of the case, is that, at common law, contracts or agreements in general or unreasonable restraint of trade were merely void and unenforceable; that either party could defend against an action based on them; but that they were not illegal in such sense as to give a right of action to third parties. While there may be conflict among the authorities, it seems to us that some confusion might have been avoided by bearing in mind the distinction between a contract or agreement merely in restraint of trade as between the parties, and a combination or contract to stifle competition, or a conspiracy to ruin a competitor. Thus if one of two rival merchants, not purchasing the business of the other, contracted with him that the latter should cease business and never enter mercantile pursuits at any time or place, the contract would be in general restraint of trade, and void, and could not be enforced. But it alone would not give a right of action to third parties; and although the retiring from business of one of the merchants might lessen facilities for trading, and incidentally cause inconvenience, or even put it in the power of the other to raise his prices, the contract as such would be merely void. But, on the other hand, suppose that two merchants should agree that one should retire from business and that no other person should open a similar business, and if he did so, that the two would drive away his customers or break up his business by violence, threats, or like means, it would get beyond the domain of a mere non-enforceable contract into the domain of conspiracy. Or suppose that a number of merchants should agree to fix the price of certain goods and not to sell below that price, if there were no statute on the subject, and the case rested on the common law, the agreement would simply be non-enforceable; but if they went further and agreed that, if any other merchant sold at a less price, they would force him to their terms

individual rights and combined action in trade is seen in numerous cases. *India Bagging Association v. Kock*, 14 La. Ann. 168; *Arnot v. Pittston & E. Coal Co.*, 68 N. Y. 558; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *The Sugar Trust Case*, 3 N. Y. S. 401, 7 N. Y. S. 406; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States v. Joint Traffic Assn.*, 171 U. S. 505; *Hooker v. Vandewater*, 4 Denio (N. Y.) 349; *Stanton v. Allen*, 5 Denio (N. Y.) 434; *Craft v. McConoughy*, 79 Ill. 346; *Nester v. Continental Brewing Co.*, 161 Pa. St. 473."

or drive away those dealing with him, by violence, threats, or boycotting, it would cease to be a mere non-enforceable contract; and if in its execution damages proximately resulted to such other merchant, he would have a right of action. For two or more people to make an agreement which neither can enforce at law against the other is one thing; but to further agree, and under that agreement proceed to force another who is no party to it, against his will, to be governed by it, under penalty of financial ruin by driving off his customers, or the like, is, to use a favorite expression of former Chief Justice Warner, "another and quite a different thing."

Courts and text-writers have not infrequently asserted that, as a general rule, a conspiracy can not be made the subject of a civil action unless something is done, which, without the conspiracy would give a right of action.

Unquestionably any person who does not occupy a public or quasi-public position (like public officials, railroad companies, etc.), or whose property has not become impressed with any public or quasi-public use (*Munn v. Illinois* (1876), 94 U. S. 113), may ordinarily deal with any other person at his option. It may also be conceded, at least for the sake of the argument, that ordinarily a number of persons may in concert decline to sell to or buy from another. Yet the facts of the present case go much further than that. Here there was a combination, not merely agreeing not to deal with the plaintiff, but undertaking also to drive off and prevent others from dealing with it, and seeking to ruin its business by destroying its power to purchase goods, unless it should submit to regulate its business or fix its prices as they desired. If the defendants, as individuals, or in any way, claim to have the right to fix the prices at which they will sell, how can they claim the plaintiff has no such right as to its own business? To protect the individual against encroachments upon his rights by greater power is one of the most sacred duties of courts. If there is any analogy between a combination of druggists to raise and maintain prices, and a biological species, the Darwinian theory is hardly a rule for a court in administering equity.

We will now refer to some authorities cited by defendants. A leading case, in modern times, is the English case of *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 608. The majority of the court of appeal found, as matter of fact, that the defendants were not engaged in a conspiracy or unlawful combination, and were not actuated by malice or ill-will toward plaintiff, and did not aim at any general injury to plaintiff's trade, the object being simply to divert the trade from plaintiff to defendants, and that the damage to be inflicted was to be strictly limited by the gain which defendants desired to win for themselves; in other words, that it was a case of competition only. Of course, the loss which a rival may suffer from legitimate competition does not give a right of action. A careful consideration of the various decisions in this case will show that, in substance, it only held that where competition was lawful, even if sharp, and the acts complained of were adopted for the advancement

of the defendants' own trade, there was no actionable conspiracy, although plaintiff may have sustained loss thereby. If this decision should be deemed adverse to the views here presented, it may be well to contrast the public policy of this state with that mentioned by Fry, L. J.² *Bowen v. Matheson*, 14 Allen, 499, will be found to have been decided on the idea of competition, but it is not a well-considered case, reviews none of the authorities (but one being cited), and decides only as to certain allegations on demurrer. It has been criticised by Mr. Eddy, whose book shows that he approached the subject without any prejudice against combinations. 1 Eddy, Comb. § 571. Mr. Freeman in his note to *Hardin v. American Glucose Co.*, 74 Am. St. R. 244, says: "Massachusetts seems also to have gone astray on the question of illegal combinations, . . . having confused the doctrine relating to contracts in restraint of trade and the doctrine against restrictions upon competition." *McCaughey v. Tierney* (R. I. 1895) 33 L. R. A. 1, is another case relied on by defendants. If this decision is sound, it can only be on the idea that the defendants were seeking to obtain trade for themselves by saying, in effect: "If you deal with us, we will deal with you; if you deal with others, we will withdraw our patronage." Whether such an agreement was legally enforceable need not be discussed. There was no effort to compel or coerce others not members to be bound by their prices or views. If the decision in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. R. 319, can be sustained, it must be on the same idea. No compulsory measures seem to have been used to enforce obedience on members; nor does there appear to have been any effort to drive away from plaintiff others than those voluntarily acting together in concert, and no pressure on outsiders to maintain prices or incur ruin. In truth, however, some of what was said in that decision is unsound, and not in accord with cases already cited. It has been considerably criticised. It seems, too, that in some cases in New York and elsewhere an idea has arisen of determining how much competition is desirable, and apparently of holding that extreme competition is undesirable, and a combination to meet it is not unlawful.

Judgment affirmed.³

²"Engrossing, forestalling, and regrating still stand in our code as criminal offenses, and the presiding judge is required to give the law in reference to these offenses specially in charge to the grand jury at each term of court. See Penal Code, §§ 662, 846. Our State constitution declares that the legislature "shall have no power to authorize any corporation . . . to make any contract, or agreement whatever, with any such corporation (i. e., other corporations), which may have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void."

³See *accord: Gatzow v. Buening*, 106 Wis. 1 (1900), of the defendants, one was a member of the Liverymen's Association of Milwaukee, the other the secretary of the association. The former had contracted with an undertaker who was in charge of the burial of the plaintiff's child, to supply a hearse and carriage. By the rules of the association the members might not supply vehicles to persons who did not deal exclusively with its members. The secretary, believing that the undertaker in question dealt with persons

4. For the use of agreements surrendering the freedom of the individual to the will of the majority.

BOUTWELL v. MARR.

Supreme Court of Vermont, 1899. 71 Vermont, 1.

MUNSON, J. It is clear that every one has a right to withdraw his own patronage when he pleases, but it is equally clear that he has no right to employ threats or intimidation to divert the patronage of another. If it be true as a general proposition that several may lawfully unite in doing to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be so brought about as to make its united action an unlawful means. The defendants insist that as members of the association they had a right to resolve to keep their work among themselves, and that in the absence of anything tending to show an attempt on their part to influence the action of others, they cannot be held liable. It may be true that if the defendants, acting independently of any organization and moved solely by similarity of interest and views, had united in withdrawing their patronage, the effect upon the plaintiff's business would have been the same, and yet the defendants have incurred no liability. But in the case supposed the united action would result from the free exercise of individual choice. It will be seen upon further inquiry that this cannot be said of the action of an organization like that operated by the defendants.

It is true, as suggested in argument, that every one engaged in business is liable to have it injured or destroyed by the action of those upon whom he depends for patronage. But when those upon whom he depends for patronage are acting as individuals, he has a measure of security in the probability that different preferences will be shown by persons left to their own choice; and if some who desire to injure his business secure the cooperation of others by unlawful means, the law gives him a remedy. If the defendants are right, he can be deprived of this security and this remedy by converting those who desire his injury into the majority of an association, and those who do not into a suppressed minority, held to the designated course by the pressure of a system of fines and penalties. But giving a new face to an old wrong can never defeat the remedy, for the law will require as to the substance of the thing complained of. If

not members, notified the other defendant of the fact and called on him to obey the rules. He thereupon drove off leaving the plaintiff without the conveyances necessary for the proper burial of his child. The association was held an unlawful combination to monopolize a business essential to civilized life and "to strike down competition and to hamper individual industry, so as to compel every person, in order to obtain proper facilities for a funeral, to submit to the dictates of a combine," and the defendants were liable for damages caused by their acts done in pursuance of its provisions.

the plaintiffs were in fact injured by a forced withdrawal of patronage secured through the action of defendants' organization, they are entitled to redress. Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion. In this case, it could easily be found that a fine of fifty dollars for a violation of the rules was not intended to be applied to rules adopted to secure a performance of the ordinary duties of membership. If in fact designed to hold unwilling members to unity of action in aggressive movement of unlawful character, the defendants cannot complain if the law so treats it. The jury could probably infer from the nature and management of the defendants' organization that their united action was due in part to the means adopted to secure it. The force of the measure resolved upon lay partly in the fact that the by-laws threatened penalties against any one who should fail in carrying it into effect.

The fact that the members of the association voluntarily assumed its obligations in the first instance, so far as it be a fact, is not controlling. The law cannot be compelled by any initial agreement of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The law sees in the membership of an association of this character both the authors of its coercive system and the victims of its unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation, simply by working through an association. But it can hardly be supposed that the defendants' organization reached its present proportions without some previous use of the methods disclosed by the evidence above recited; and as far as its membership was due to coercion, there was a further element of unlawful pressure in the enforcement of united action against the plaintiffs. It would be strange indeed if the members of an association, organized upon such a basis and advanced by such means, could meet a claim of this nature by saying that they had made no attempt to secure the cooperation of outside parties. It is clear that if the association had comprised but a small portion of the manufacturers, and had destroyed the plaintiff's business by compelling other manufacturers to join them in withholding patronage, its members would have been liable. But it is claimed, in effect, that a business can be destroyed with impunity, when the organization has become so extensive that there are no outside patrons to control, or so few that their course is a matter of no moment. Upon this theory, every successful instance of coercion would increase the safety with which another coercion could be attempted, and when coercion had been pursued until but

one contumacious person remained, immunity would be complete. It is clear that the law cannot concede to organizations of this character the powers and immunities claimed for their association by these defendants, and retain its own power to protect the individual citizen in the free enjoyment of his capital or labor.¹

SECTION 3.

The Effect of a Dominating Desire to Injure the Plaintiff.

McCUNE v. NORWICH CITY GAS CO.

Supreme Court of Errors of Connecticut, 1862. 30 Conn. 521.

SANDFORD, J. This is a motion in arrest for the insufficiency of the declaration. There are two counts, but in all their material allegations they are substantially alike, and the same questions arise on both of them.

The plaintiff alleges that the defendants were a corporation, created for the purpose, and engaged in the business, of making, distributing and selling illuminating gas, and that they had laid down their main pipes in the streets and lanes of the city for the conveyance of gas to their customers; that the plaintiff's rooms had been fitted up with gas-pipes and fixtures, connected with the defendants' main pipes, and that for some time immediately prior to the 15th November, 1858, the defendants had by means of said pipes supplied the plaintiff with gas for lighting said rooms for a certain reasonable compensation paid therefor, and that the plaintiff desired to continue to light his said rooms with gas as aforesaid, and was ready and willing to pay to the defendants a reasonable compensation for the same, and to abide by all the reasonable rules and regulations of said company, and requested the defendants to continue to supply said rooms with gas; and that it then became and was the duty of the defendants to continue to supply the plaintiff with gas for the purposes aforesaid on the conditions aforesaid; yet that the defendants, not regarding their said duty, but contriving and intending to vex and annoy the plaintiff in the use and enjoyment of his said premises, maliciously, wantonly, and without any justifiable cause, and contrary to the mind and will of the plaintiff, refused to supply the plaintiff with gas, and shut off the same from entering the gas pipes of said rooms, &c.; by reason whereof the plaintiff has been deprived of the means of lighting said rooms with gas, and of the

¹ *Accord: Martell v. White*, 185 Mass. 255 (1904), similar fact; and see *Jackson v. Stanfield*, *post*; and *Shinola Co. v. House of Krieg*, 138 N. Y. Suppl. 1015 (1912); and compare *Downes v. Bennett*, 63 Kans. 653 (1901), in which the court denied the injunction on the ground that there was no proof that any member of an association was prevented from dealing with the plaintiff. In *Bradley v. Pierson*, 148 Pa. St. 502 (1892), the court refused to admit evidence as to what the rules of the defendant association required its members to do, when a workman, blacklisted by one member, applied for work to another; and see *Baker v. Ins. Co.* and *Trimble v. Ins. Co.*, Note 1 to *London Guarantee Co. v. Horn*.

use and enjoyment of said gas fixtures, and has been put to great expense in providing other means of lighting said rooms, &c."

No contract for the supply of gas for any definite period is alleged to have been made by the defendants, nor indeed any contract at all. The entire foundation of the plaintiff's claim, as it is set out in this declaration, rests upon the supposed legal duty or obligation, independent of any contract, to continue the supply. But no facts are stated from which such duty or obligation arises, and the allegation of a duty or liability is of no avail, and will not help a declaration, unless the facts necessary to raise it are stated.

Had the defendants agreed to furnish the plaintiff with gas for any specified time, or until they should give notice of their intention to discontinue the supply, they would undoubtedly have been liable in damages for the nonperformance of such contract, but the contract itself must have been set up in the declaration and the action must have been founded upon it. And perhaps too, had the plaintiff declared upon a contract by the defendants to supply him with gas until they should give him reasonable notice of their intention to discontinue such supply, the jury might have found such contract and its violation, upon proof of the facts and circumstances detailed in this declaration. But no such case is now before us, and we know of no principle upon which we could stand in holding the defendants liable upon the facts set up in this declaration.

The manufacture and sale of gas is a business which may be prosecuted or discontinued at the will of the party engaged in it. The relations between the maker and the consumer originate in the contract between them, and their respective rights and obligations are controlled entirely by the stipulations of such contract, and as, (where no contract prohibits,) the one may refuse to take the article at his pleasure, so may the other at his pleasure refuse to supply it. We discover no reason for subjecting the maker of gas to duties or liabilities beyond those to which the manufacturers and vendors of other commodities are subjected by the rules of law. The articles of association under which the defendants are organized and exist as a corporate body, confer upon them no peculiar powers, and impose no peculiar duties or obligations affecting the question now before us.

The allegation that the defendant cut off the supply of gas *maliciously and wantonly, and with intent to injure the plaintiff*, is of no importance in the determination of this question. Where a party has a legal right to do a particular act at pleasure, the motive which induced the doing of the act at the time in question can never affect his legal liability for the act, whatever effect such motive may have upon the quantum of damages, when his liability is fixed.

We think the motion in arrest ought to prevail, and we advise accordingly.

In this opinion the other judges concurred.¹

¹ Nor is it more unlawful to combine with others for such purpose, *Collins v. American News Co.*, 34 Misc. 260 (N. Y. 1901), affirmed 68 App. Div. 639 (N. Y. 1902), defendants, newspaper publishing companies, agreed to dis-

ERTZ v. PRODUCE EXCHANGE OF MINNEAPOLIS.

Supreme Court of Minnesota, 1900. 79 Minn. 140.

Appeal from the order of the district court of Hennepin county overruling the defendants' demurrer to the plaintiff's complaint.

The material facts alleged in the complaint are these:¹

The plaintiff is and has been for some time a commission merchant buying and selling farm produce. As such it is necessary for him to buy such produce in the Minneapolis market and resell the same to his customers. The defendants are engaged in buying and selling farm produce and are practically all persons, firms and corporations so engaged in Minneapolis and control the quantity and price of such produce and the purchase and sale thereof. Up to July 19, 1889, the plaintiff was accustomed to buy from them. But on that day and thereafter the defendants, the produce exchange, conspired with the other defendants not to sell to or buy of the plaintiff any farm produce, and maliciously solicited and procured from them and from many other persons to the plaintiff unknown, an agreement not to buy or sell such produce from or to the plaintiff and did induce such other defendants and other persons not to sell to him or buy of him. In pursuance of the conspiracy all the defendants have refused to deal with the plaintiff and have circulated among his patrons reports that he was unable to buy such produce, with the intent to induce such patrons to discontinue doing business with the plaintiff. The business of the plaintiff, by reason of the premises, has been ruined and he has been damaged thereby in the sum of \$20,000.

START, C. J. The defendants rely upon the case of *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, in support of their contention that the defendants' acts in question were lawful. The general propositions of law laid down in the decision in that case are sound as applied to the facts of that particular case.

continue selling their papers to the plaintiff, a newsdealer, unless he abandoned the distribution of advertisements which threatened injury to their own advertising business. "There is no place in any system of jurisprudence yet devised for the principle that a man may be compelled to sell his goods or his labor to one with whom he does not wish to deal merely because his refusal to do so may cause loss to him who wants them." See *Reynolds v. Plumbers' Material Protective Ass'n*, 30 Misc. 709 (N. Y. 1900); *Schulten v. Bavarian Brewing Co.*, 96 Ky. 224 (1894); and *Lough v. Outerbridge*, 143 N. Y. 271 (1894), p. 283; and *Orr v. Home Mut. Ins. Co.*, 12 La. Ann. 255 (1857); *Hunt v. Simonds*, 19 Mo. 583 (1854); *Baker v. Ins. Co. and Trimble v. Prudential Ins. Co.*, 64 S. W. 915 (Ky. 1901), cited in Note 1 to *Macaulay v. Tierney*, ante.

As to what Professor James Barr Ames regards as the fundamental distinction between a malevolent act and a malevolent misfeasance, see 18 Harv. L. R. p. 416, n. 1.

"According to recent French authority, even the refusal to contract may in certain circumstances be an abuse of right," F. P. Walton, Esq., *Motive as an Element in Torts*, 22 Harv. L. R. 501, p. 509, see cases cited by him in notes 4, 5 & 6.

¹The allegations in the complaint are slightly condensed.

It is to be noted that the defendants in the Bohn case had similar legitimate interests to protect, which were menaced by the practice of wholesale dealers in selling lumber to contractors and consumers, and that the defendants' efforts to induce parties not to deal with offending wholesale dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage from such wholesale dealer. In this respect the case differs essentially from the one at bar, in which the complaint does not show that the defendants had any legitimate interests to protect by their alleged combination. On the contrary, it is expressly alleged in the complaint that the combination, which was carried into execution, was for the sole purpose of injuring the plaintiff's business, and that the defendants conspired to induce the plaintiff's patrons and persons, other than the defendants, to refuse to deal with him. Such alleged acts on the part of the defendants are clearly unlawful.

It is true, as claimed by the defendants and as stated in the Bohn case, that a man, not under contract obligations to the contrary, has a right to refuse to work for, or deal with, any man or class of men, as he sees fit, and that the right which one man may exercise singly, many may lawfully agree to do jointly by voluntary association, provided they do not interfere with the legal rights of others. But one man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him. See *Walker v. Cronin*, 107 Mass. 555, 562; *Dels v. Winfree*, 80 Tex. 400, 16 S. W. 111; *Graham v. St. Charles*, 47 La. An. 214, 16 So. 806; *Hopkins v. Oxley S. Co.*, 49 U. S. App. 709. This is just what the complaint in this case charges the defendants with doing, and we hold that it states a cause of action.*

* Accord: *Dels v. Winfree*, 80 Tex. 400 (1891), where the defendants were also traders combining to refuse to supply a competitor with goods to sell and to induce, by means not stated, others not members of the combination to do the same, the court does not consider the question as to whether such conduct is justifiable as legitimate competition; *Globe, etc., Ins. Co. v. Firemen's Fund Ins. Co.*, 97 Miss. 148 (1910), defendants, with intent to ruin the plaintiff's business, induced their agents to leave them. In *Olive and Sternenberg v. Van Patten*, 7 Tex. Civ. App. 630 (1894), the defendants were associated retail merchants who, desiring to stop the practice of manufacturers selling directly to consumers, and the plaintiff was a manufacturer so selling, the means used was a circular sent to all retailers, whether members of the association or not, appealing to them to discourage this practice, as detrimental to their interests, by refusing to sell to the plaintiff, Collard, J. said: "It can not be held that the defendants had the right to prevent plaintiffs from selling to customers or that such interference by them (the defendants) was serving a legitimate purpose connected with their own business. To break plaintiffs down as competitors for the consumers' trade might, it is true, result in benefit to defendants, but such a benefit obtained in such a manner could not be deemed a legitimate purpose within the meaning of the opinion quoted," (i. e., that in *Dels v. Winfree*, *Norman and Pearson*).

To withdraw or threaten to withdraw one's patronage from those who

TUTTLE v. BUCK.

Supreme Court of Minnesota, 1909. 107 Minn. Rep. 145.

ELLIOTT, J. It has been said that the law deals only with externals, and that a lawful act cannot be made the foundation of an action because it was done with an evil motive. In *Allen v. Flood*, (1898) A. C. 1, 151, Lord Watson said that, except with regard to crimes, the law does not take into account motives as constituting an element of civil wrong. In *Mayor v. Pickles*, (1895) A. C. 587, Lord Halsbury stated that if the act was lawful, "however ill the motive might be, he had a right to do it." In *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. 882, the court said that, "when one exercises a legal right only, the motive which actuates him is immaterial." In *Jenkins v. Fowler*, 24 Pa. St. 308, Mr. Justice Black said that "malicious motives made a bad act worse, but they cannot make that wrong which, in its own essence, is lawful." This language was quoted in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 233, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. 319, and in substance in *Ertz v. Produce Exchange*, 79 Minn. 140, 143, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. 433. See also 2 Cooley Torts (3d Ed.) 1505; *Auburn v. Douglas*, 9 N. Y. 444.

Such generalizations are of little value in determining concrete cases. They may state the truth, but not the whole truth. Each word and phrase used therein may require definition and limitation. Thus, before we can apply Judge Black's language to a particular case, we must determine what act is "in its own essence lawful." What did Lord Halsbury mean by the words "lawful act"? What is meant by "exercising a legal right"? It is not at all correct to say that the motive with which an act is done is always immaterial, providing the act itself is not unlawful. Numerous illustrations of the contrary will be found in the civil as well as the criminal law.

In *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 70 Am. St. 330, Mr. Justice Hammond said: "It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in *Allen v. Flood*, as reported in (1898) A. C. 1, as follows: 'An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer

deal with a noncompetitor where the object is to punish him for conduct personally offensive or only indirectly injurious to one's business, is actionable if it injure his business and may be restrained by injunction. *Webb v. Drake*, 52 La. Ann. 290 (1899), the defendants, merchants, controlling the greater part of the business in the locality, who, resenting the plaintiff's conduct as assessor, refused to buy of "drummers" who stopped at plaintiff's hotel; *Baldwin v. Liquor Dealers' Assn.*, 165 Mich. 98 (1911), customers and advertisers in the complainant's paper, which had criticised the manner in which the saloon business was carried on in the town, were coerced into withdrawing their patronage by threats on the part of the defendants that otherwise they would cease to deal with such customers and advertisers; with which compare *Lewis v. Huie-Hodge Lumber Co.*, 121 La. 658 (1908).

of the act liable to a civil action.' If the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate."

It is freely conceded that there are many decisions contrary to this view; but, when carried to the extent contended for by the appellant, we think they are unsafe, unsound, and illy adapted to modern conditions. To divert to one's self the customers of a business rival by the offer of goods at lower prices is in the general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which in its moral quality may be no better than highway robbery.

Nevertheless, in the opinion of the writer this complaint is insufficient. It is not claimed that it states a cause of action for slander. No question of conspiracy or combination is involved. Stripped of the adjectives and the statement that what was done was for the sole purpose of injuring the plaintiff, and not for the purpose of serving a legitimate purpose of the defendant, the complaint states facts which in themselves amount only to an ordinary everyday business transaction. There is no allegation that the defendant was intentionally running the business at a financial loss to himself, or that after driving the plaintiff out of business the defendant closed up or intended to close up his shop. From all that appears from the complaint he may have opened the barber shop, energetically sought business from his acquaintances and the customers of the plaintiff, and as a result of his enterprise and command of capital obtained it, with the result that the plaintiff, from want of capital, acquaintance, or enterprise, was unable to stand the competition and was thus driven out of business. The facts thus alleged do not, in my opinion, in themselves, without reference to the way in which they are characterized by the pleader, tend to show a malicious and wanton wrong to the plaintiff.

A majority of the justices, however, are of the opinion that, on

the principle declared in the foregoing opinion, the complaint states a cause of action, and the order is therefore affirmed.

Affirmed.

JAGGARD, J., dissents.

¹In 18 Harvard Law Review 420, the late Professor James Barr Ames expressed his opinion that the defendant would be liable under facts substantially identical with those in the principal case, which facts, however, he thought impossible of occurrence. Accord: *Boggs v. Duncan-Schell Furniture Co.*, 143 N. W. 482 (Iowa 1913), the defendants' agency for the sale of sewing machines having been terminated by the maker and the plaintiff having been appointed as successor, the defendant threatened to drive the plaintiff out of business with the same machine. The defendant thereupon procured some old machines of the same make and advertised them as just received, the latest pattern and equipped with the most modern appliances, and for sale at practically half the price charged by the plaintiff. The plaintiff attempted to buy up these old machines and complained of the advertisement as hurting his business. The defendant refused to sell them and said that he did not care what effect his advertisement had he advertised just as he pleased. It was held that the plaintiff might recover for the harm done by the defendant.

Contra: *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 163, 44 C. C. A. 426 (1900), demurrer sustained to a declaration in which the plaintiff, a manufacturer of calicoes, alleged that the defendant, a wholesale dealer in dry goods, conspiring with persons unknown and maliciously intending to injure the plaintiff in its business, cause it great loss and ruin its trade with jobbers in St. Louis, had advertised a stock of goods owned by the defendant but of the plaintiffs' manufacture, for sale at prices less than that fixed by it, so causing jobbers, who had bought its goods, to cancel their contracts or demand rebates in price, and making other jobbers afraid to buy its goods except in small quantities and at low prices. Sanborn, J., dissented on the ground that these acts done with such an object, required justification, but conceded that they could be justified if done for the purpose of selling them for what the defendants believed to be their own gain or in competition with the plaintiff for trade; and see *Cole-ridge, C. J.*, in giving judgment for the defendant in the Court of Queen's Bench in *The Mogul Steamship Co. v. McGregor*, L. R. 21 Q. B. D., pp. 544, 552, "The question comes at last to this, what was the character of these" (the defendants') "acts and what was" (their) "motive in doing them?"

CHAPTER V.

Regulation of the Exercise of Mutually Conflicting Rights.

SECTION 1.

Rights Enjoyed by All Citizens (Use of Highways).

CALLANAN *v.* GILMAN.

Court of Appeals of New York, 1887. 107 N. Y. 360.

EARL, J. The primary purpose of streets is use by the public for travel and transportation, and the general rule is that any obstruction of a street or encroachment thereon which interferes with such use is a public nuisance. But there are exceptions to the general rule born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers, and the use of a street for public travel may be temporarily interfered with in a variety of other ways without the creation of what in law is deemed to be a nuisance. But all such interruptions and obstructions of streets must be justified by necessity. It is not sufficient, however, that the obstructions are necessary with reference to the business of him who erects and maintains them. They must also be reasonable with reference to the rights of the public who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto. A reference to a few cases will show what courts have said upon this subject.

In *Rex v. Russell*, 6 East 427, where the defendant, a wagoner, was indicted for occupying one side of a public street before his warehouse for loading and unloading his wagons, the court said "that it should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public; that the primary object of the street was for the free passage of the public, and anything which impeded that free passage without necessity was a nuisance; that if the nature of the defendant's business was such as to require the loading and unloading of many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot."¹

¹ *Benjamin v. Storr*, L. R., 9 C. P. 400 (1874).

In *Rex v. Cross*, 3 Camp. 224, the defendant was indicted for allowing his coaches to remain an unreasonable time in a public street, and the court said: "Every unauthorized obstruction of a highway to the annoyance of the king's subjects is a nuisance. The king's highway is not to be used as a stable yard. * * * A stage coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be provided for the coach to stand while waiting between one journey and the commencement of another." In *Rex v. Jones*, 3 Camp. 230, the defendant, a lumber merchant in London, was indicted for the obstruction of a part of a street in the hewing and sawing of logs, and the court said: "If an unreasonable time is occupied in delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience should be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict, steady application of it. I cannot bring myself to doubt the guilt of this defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway with his lumber yard, and if the street be too narrow he must move to a more convenient place for carrying on his business."² In *Commonwealth v. Passmore*, 1 S. & R. 217, the defendant, an auctioneer, was indicted for a nuisance in placing goods on the foot-way and carriage-way of one of the public streets of the city and suffering them to remain for the purpose of being sold there, so as to render the passage less convenient, although not entirely to obstruct it, and the court said: "It is true necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But, inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner."³ On the same principle a merchant may

² Accord: *Emerson v. Babcock*, 66 Iowa 257 (1885), hay scales placed upon public street; *Kerr v. Forgue*, 54 Ill. 482 (1870), and *McCloughry v. Finney*, 37 La. Ann. 27 (1885), goods stored on sidewalk.

³ Accord: *Wood v. Mears*, 12 Ind. 515 (1859); *Vanolinda v. Lothrop*, 21 Pick. 292 (Mass. 1838); *Clark v. Fry*, 8 Ohio St. 358 (1858); *Palmer v. Silverthorn*, 32 Pa. 65 (1858); *Chicago v. Robbins*, 2 Black 418 (U. S. 1862), p. 424, *semble*, and this includes the right to deposit on the street for removal the earth excavated in such operations, *Hunhausen v. Bond*, 36 Wis. 29 (1874); see *Piollet v. Simmers*, 106 Pa. St. 95 (1884), where a barrel on wheels used by an abutting owner to whitewash his fence, was left over Sunday on

have his goods placed in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purposes of selling them there, because there is no necessity for it.⁴ * * * I can easily perceive that it is for the convenience and interest of an auctioneer to place his goods in the street because it saves the expense of storage. But there is no more necessity in his case than in that of a private merchant. It is equally in the power of the auctioneer and the merchant to procure warehouses and places of deposit in proportion to the extent of their business." In *The People v. Cunningham*, 1 Denio, 524, the defendants were indicted for obstructing one of the streets in the city of Brooklyn, and the court said: "The fact that the defendants' business was lawful does not afford them a justification in annoying the public in transacting it; it gives them no right to occupy the public highway so as to impede the free passage of it by the citizens generally. The obstruction complained of is not of the temporary character which may be excused within the necessary qualifications referred to in the cases cited, but results from a systematic course of carrying on the defendants' business. It is said that this business cannot be carried on in any other manner at that place so advantageously either to individuals or the public. The answer to this is to be found in the observations of the court in *Russell's Case* (above cited). 'They must either enlarge their premises or remove their business to some more convenient spot.' Private interests must be made subservient to the general interest of the community."⁵ In *Welsh v. Wilson*, 101 N. Y. 254, a case where the defendant obstructed a sidewalk in the city of New York with skids a few minutes while he was engaged in removing two large cases of merchandise from his store to a truck, in consequence of which the plaintiff claimed to have been injured while passing through the street, we said: "The defendant had the right to place the skids across the sidewalk temporarily for the purpose of removing the case of merchandise. Every one doing business along a street in a populous city must have such a right to be exercised in a reasonable manner so as not to unnecessarily encumber and obstruct the sidewalk." In *Mathews v. Kelsey*, 58 Me. 56, the court said: "As an incident to this right of transit, the public have a right to load and unload such vehicles (in the street or from the street) as they find

the highway by the side of the traveled way. In *Palmer v. Silverthorn*, 32 Pa. 65 (1858), it is held that abutting owners have the right to place such building material in the street irrespective of the necessity of so doing on the particular occasion, *contra*, *Wood v. Mears*, 12 Ind. 516 (1859).

⁴Accord: *Lavery v. Hannigan*, 20 Jones & S. 463 (N. Y. 1885), goods displayed on part of sidewalk enclosed by awnings; *State v. Laverack*, 34 N. J. L. 201 (1870); *Commonwealth v. Ruggles*, 88 Mass. 588 (1863), fairs held in highways, in England a custom to hold such fairs is a good custom, *Elwood v. Bullock*, 13 L. J. Q. B. 330; *Commonwealth v. Wentworth*, Brightly 318 (Pa. 1822); *St. John v. Mayor*, 3 Bosw. 483 (N. Y. 1858), booths and stalls for sale of goods placed on sidewalks, *aliter* where such stalls are so placed while a market house is undergoing repair, *St. John v. Mayor*, 6 Duer 315 (N. Y. 1857).

⁵See *State v. Chicago, M. & St. P. R. Co.*, 77 Iowa 442 (1889).

it convenient to use. But in this respect each individual is restrained by the rights of others. He must do his work in such careful and prudent manner as not to interfere unreasonably with the convenience of others."⁶

Now what are the facts of this case? Both the plaintiffs and the defendant were extensive retail and wholesale grocers having stores near to each other on the south side of Vesey street in the city of New York; and a large portion of the plaintiffs' customers, in order to reach their store, were obliged to pass upon the sidewalk in front of the defendant's store. Goods were taken to and from the defendant's store by means of trucks loaded in the street. The trucks were placed in the street adjoining the sidewalk and then a bridge made of two skids planked over so as to make a plank-way three feet wide and fifteen feet long, with side pieces three and one-half inches high, was placed over the sidewalk with one end resting upon the stoop of the defendant's store and the other end upon a wooden horse outside of the sidewalk near the truck to be loaded. This bridge was elevated above the sidewalk at the inner end about twelve inches and at the outer end about twenty inches, thus entirely obstructing the sidewalk, and goods were conveyed over this bridge to and from the store. Persons wishing to pass upon the sidewalk in front of the store, when the bridge was in place, were obliged to step upon the stoop and go around that end of the bridge. The bridge was usually removed when not in use; but there was uncontradicted evidence that it was sometimes permitted to remain in position, when not in use, for ten or fifteen minutes, and that it sometimes remained in position when in use one hour, one hour and a half and sometimes even two hours; and the court found that the bridge thus remained in position across the sidewalk from four to five hours each business day between the hours of nine o'clock a. m. and five p. m., and that it obstructed the sidewalk the greater part of every business day. Such an extensive and continuous use of the sidewalk cannot be justified. It was a practical appropriation by the defendant of the sidewalk in front of his store to his private use in disregard of the public convenience. Even if in some sense such use was necessary to the convenient and profitable transaction of his business, and if the obstruction of the sidewalk was no more and even less than it would be by any other method of doing business, these circumstances do not justify the obstruction. If the defendant cannot transact his extensive business at that place without thus encroaching upon, obstructing and almost appropriating the sidewalk during the business hours of the day, he must either remove

⁶ *Accord: Haight v. Keokuk*, 4 Iowa 199 (1856); *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380 (1890); *Jochem v. Robinson*, 66 Wis. 638 (1886), 72 Wis. 199 (1888), and see *Denby v. Willer*, 59 Wis. 240 (1884); *Sikes v. Manchester*, 59 Iowa 65 (1882); *Judd v. Fargo*, 107 Mass. 264 (1871), vehicles standing in street while being, or waiting to be, loaded or unloaded; see *Vanolinda v. Lothrop*, 21 Pick. 292 (Mass. 1838). The length of time the goods or vehicles remain on the sidewalk or street and the fact that the highway is much or little frequented are important factors in determining whether the obstruction is reasonable, *Judd v. Fargo*, 107 Mass. 264 (1871).

his business to some other place or enlarge his premises so as to accommodate it. It was incumbent upon the defendant to show, not only that the use he made of the sidewalk was necessary in his business, but also that it was reasonable in reference to the public convenience. That it was unreasonable is too clear for dispute.⁷ He might use the bridge to load or unload a single truck, and this he could do at intervals during the day, at no one time obstructing the street for any considerable length of time. But there is no authority, and no rule of law which would warrant such an obstruction daily for hours, or even one hour continuously. The defendant was, therefore, guilty of a public nuisance.⁸

FRITZ v. HOBSON.

Chancery Division, 1880. L. R. 1880, 14 Ch. Div. 542.

This action brought to restrain an alleged nuisance committed by the defendant, and for damages.

Fry, J., after stating the nature of the relief claimed, and observing that the trespasses proved, as distinguished from the nuisance, were of the most trifling descriptions, and that he could only award the plaintiff one farthing damages in respect of them, continued:—

The serious part of the case arises out of the allegation of loss of custom to the plaintiff in his character of a dealer in articles of antiquity, old china, and so forth, and of a tailor.

With regard to the business of a tailor there is no evidence of loss; the other business I shall consider presently.

The plaintiff puts his case in two ways. He says, first, the defendant has created a public nuisance, which has resulted in special or peculiar damage to me in consequence of the place where I reside and the place where the nuisance has been committed being so near to each other; and, secondly, I have a private right of entrance from the highway to my dwelling-house, and that private right the defendant has interfered with.

Before I consider those rights separately, I must inquire whether the defendant's user of the roadway of *Fetter Lane* and the plaintiff's passage has been reasonable or unreasonable. The law with regard to the point appears to be easily gathered from one or

⁷ As to the function of court and jury in determining whether the defendant's use of the highway is reasonable, compare *Jochem v. Robinson*, 72 Wis. 199 (1888).

⁸ Accord: *Flynn v. Taylor*, 127 N. Y. 596 (1891). The burden rests on the abutting owner to show that his use is reasonable. *Jochem v. Robinson*, 66 Wis. 638 (1886); *Graves v. Shattuck*, 35 N. H. 257 (1857). The fact that the other owners make the same use of the highway is no justification if it be unreasonable. *Commonwealth v. Passmore*, *Judd v. Fargo*, 107 Mass. 264 (1871), *McCloughry v. Finney*, 37 La. Ann. 27 (1885).

As to the power of a municipality to authorize such obstructions, see *Chapman v. Lincoln*, 84 Nebr. 534 (1909), 25 L. R. A. (N. S.) 400, with exhaustive note.

two cases. In *Rex v. Jones*, 3 Camp. 230, Lord Ellenborough said: "So as to the repairing of a house—the public must submit to the inconvenience occasioned necessarily in repairing the house; but, if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance." Again, in *Benjamin v. Storr*, Law Rep. 9 C. P. 400, the question left by Mr. Justice Honeyman to the jury was, p. 402, "whether or not the obstruction of the street was greater than was reasonable in point of time and manner, taking into consideration the interests of all parties, and without unnecessary inconvenience, telling them that they were not to consider solely what was convenient for the business of the defendants." The defendant has asserted at the Bar an unqualified and absolute right to approach the area of the building operations which he was carrying on by the nearest road, to any extent, for any materials, for any time, and without regard to the plaintiff's convenience or inconvenience. Such a claim is, in my judgment, untenable. It appears to me to be the expression of the selfish and not of the social man, of the man who recollects his rights but forgets his obligations, and human life could not be carried on if such extreme rights were asserted and insisted on. The question I have to decide is whether the user of the road or the roads in question by the defendant was, having regard to all the circumstances of the case, reasonable. The circumstances are undoubtedly peculiar. The block of building which the defendant had to erect could be approached from roads only by means of three passages—*Crane Court*, leading from *Fleet Street*; *Fleur-de-Lis Court*, leading from the southern part of *Fetter Lane*; and that which has been called for convenience the plaintiff's passage,¹ leading directly from the northern part of the site of the new buildings into *Fetter Lane*. The last passage was undoubtedly the most convenient mode of access for the defendant to the site. It was the most convenient for several reasons. It was the shortest, and it also led to that portion of the site which the defendant used as a yard for the purpose of his building operations. Moreover, the operations which the defendant had to carry on were very considerable. The building contract was for nearly £6000. He had to remove a very large quantity of old building materials and rubbish, the removal of which occupied from the 21st of May to the 9th of July. He had to carry in a very large quantity of new materials, and the building operations lasted for several months. Under these circumstances, it appears to me that to carry on the whole of the defendant's operations through the plaintiff's passage was not reasonable. I am unable to see why a large proportion of the old materials might not have been carried down *Crane Court*, or why a much larger proportion might not have been carried down *Fleur-de-Lis Court*, and the inconvenience necessarily created by carrying away rubbish of that character distributed over the whole of the passages which gave access to the site. Further than that, it ap-

¹ Upon which was the entrance to the plaintiff's shop and one of the windows in which his wares were shown.

appears to me that the defendant, having regard to the peculiar difficulties of the case, should have made some different arrangement as to the time during which his operations were carried on. In fact he carried them on during the busiest hours of the day, and took no pains to diminish the inconvenience by carrying them on early in the morning or late at night.

What was the result to the plaintiff of the operations thus carried on by the defendant? Undoubtedly the passage by his house was for a long period of time practically devoted to the defendant's building operations. For exactly how many days it was unsafe to cross that passage I do not know, but certainly for months those operations went on, and it appears to me that they went on in such a manner as to render it exceedingly difficult, if not impossible, for persons coming up from *Fleet Street* on the eastern side of *Fetter Lane*, to obtain access to the plaintiff's premises, and the natural effect would be to drive away persons who might have become customers of the plaintiff, and to render the access to his house so difficult that most persons would abandon passing along that side of the road. And there is some evidence that persons who were in the frequent habit of going to the plaintiff's house as customers ceased to do so during a portion of the time in which these operations were going on.

What then has been the result of these operations to the plaintiff? I have come to the conclusion that the plaintiff has proved that he has sustained considerable loss in his business as a dealer in old curiosities in consequence of the defendant's operations, and although it is very difficult to assess the amount of that loss, I have, sitting as a judge of fact, arrived at the conclusion that he has sustained loss to the extent of £60.² I shall direct the whole sum which I have mentioned, and which, as I have said, includes the damages sustained subsequent to the issue of the writ, be paid by the defendant to the plaintiff.³

² A part of the opinion is omitted holding that the plaintiff's damage was sufficiently special to him to give him a private right of action though the nuisance was public, and that the fact that the nuisance had been discontinued before decree did not oust the jurisdiction of equity once having acquired but the court might enter a decree for the payment of the damages sustained up to the time of said discontinuance.

³ In the following cases the defendant's use of the highway was held unreasonable as interfering with the rights of the abutting owner, *Cohen v. New York*, 113 N. Y. 532 (1889), storing a wagon in street in front of plaintiff's premises, *Turner v. Holtzman*, 54 Md. 148 (1880), stage coach kept standing where it blocked access to a camp meeting; *Branahan v. Cincinnati Hotel Co.*, 39 Ohio St. 333 (1883), hackney coaches standing immediately in front of plaintiff's premises; see *Graves v. Shattuck*, 35 N. H. 257 (1857), frame building being moved through the streets of a town at the peril of injuring the shade trees growing thereon. To allow a horse and carriage to stand in front of a house while the owner makes a business or social call is not an unreasonable interference with the public's right to the unobstructed use of the highway, *Norristown v. Moyer*, 67 Pa. 355 (1871), p. 367; but to stand one's wagons in the street for the purpose of selling goods therefrom, is; *Davis v. Bangor*, 42 Maine 522 (1856), *semble*. But see *State v. Edens*, 85 N. Car. 522 (1881), holding that such a merely temporary use, unlike a permanent structure in the highway, is only a nuisance if it substantially

SECTION 2.

Acts Permitted in Order to Secure to a Property Owner the Right to Freedom of Choice in His Use Thereof.

KNOWLES v. RICHARDSON.

1 Modern Reports, 55 (1669).

Error of a judgment in the common pleas in an action upon the case, for obstructing a prospect. *Sympson*. The stopping of a prospect is no nuisance, and consequently no action on the case will lie for it. *Aldred's case*, Rep. 9, is express, that for obstructing a prospect, being matter of delight only, and not of necessity, an action will not lie. *Twisden*. Why may not I build up a wall, that another man may not look into my yard? Prospects may be stopped, so you do not darken the light. Judgment *nisi*, etc.

LETTS v. KESSLER.

Supreme Court of Ohio, 1896. 54 *Ohio St.* 73.

Petition to restrain a high board fence which the defendant was building on his land.

The demurrer was overruled.

The plaintiff owned and occupied certain premises which he used as a boarding house; defendant owned and occupied premises adjoining those of the plaintiff; between the two houses is a driveway and an open space about twenty feet wide. The plaintiff and defendant had a litigation on account of the defendant having attached a shed roof to the plaintiff's building without her consent. After the trial of the litigation the defendant removed the shed roof and built up against the plaintiff's house a tight board fence eighty-six feet long, reaching from two feet from the ground up to the eaves of the plaintiff's building, completely covering up the windows of all the rooms on that side of the house and shutting out the light and air from them. The defendant nailed to a board on this fence a shed roof forty feet long, under which he piled lumber. The structure was erected from motives of unmixed malice toward said plaintiff and for no useful or ornamental purpose except said shed

interferes with the passing of travellers thereon, *Graves v. Shattuck*, 35 N. H. 257 (1857), and *Sikes v. Manchester*, 59 Iowa 65 (1882), doubting whether farmer's wagons left in the street and occupying half thereof while the horses were being fed would be an unlawful obstruction, since "it would be well for the towns and villages of the state to have their streets freely used for such purposes by farmers who are trading there." That the particular use is one to which they are ordinarily put in that and similar places is regarded as tending to show it to be reasonable, *Graves v. Shattuck*, 35 N. H. 257 (1857), *Sikes v. Manchester*, 59 Iowa 65 (1882).

As to the use of vehicles, such as automobiles, especially heavy omnibuses, difficult to control and likely to skid in wet weather, compare *Wing v. London General Omnibus Co.*, L. R. 1909, 2 K. B. 652, pp. 666-667, and *Parker v. London General Omnibus Co.*, 26 T. L. R. 18 (1909), with *Philpot v. Fifth Ave. Coach Co.*, 142 App. Div. 811 (N. Y. 1911), and *Walton v. Vanguard Co.*, 25 T. L. R. 14 (1908).

roof and the wall below the shed roof, which may serve some useful purpose of the defendant in the use of his property, by protecting his lumber pile thereunder.

Decree: that defendant be enjoined from proceeding further with the erection of the fence; and that the defendant take down all of said fence and scantling projecting above the roof of said shed, and all the remainder of said fence outside of and beyond said shed.

BURKET, J. The only question in this case arises upon the following findings of fact by the circuit court:

"Said structure was erected upon the land of the defendant and belonged to him. The structure was erected by said defendant from motives of unminged malice toward said plaintiff, and for no useful or ornamental purposes of the property of said defendant."

It is not claimed that the person of the plaintiff was interfered with in this case, so that we have for consideration only the rights of property.

The fence complained of is upon the land of the defendant and belongs to him. Plaintiff fails to aver, and the court fails to find, that she has any right to, or upon, the lot of defendant below by contract, statute, or any other way known to the law for acquiring a right to, in, or upon lands, unless such right may be acquired by, and transferred to her, by means of the aforesaid "motives of unminged malice." This is a manner of acquiring on the one hand, and of transferring on the other, a right to property unknown to the law.

But it is urged in her behalf, that even if she had no right of property, and even if he was the owner of the lot, that he could not use his own land for the purpose of erecting structures thereon which subserve no useful or ornamental purpose, and are erected through motives of unminged malice toward his adjoining neighbor.

It is and must be conceded that he might, by erecting a building on his lot, shut off her light and air to exactly the same extent as is done by this fence, and that in such a case she would be without right and without remedy, even though done with the same feelings of malice as induced him to erect the fence; thus making his acts lawful when the malice is seasoned with profit, or some show of profit to himself, and unlawful when his malice is unminged with profit, the injury or inconvenience to her, meanwhile, remaining the same in both cases. If through feelings of malice he desires to shut the light and air from her windows, it is nothing to her whether he makes a profit or loss thereby. Her injury is no greater and no less in the one case than in the other. As to her it is the effect of the act, and not the motive.

In effect he has the right to shut off the light and air from her windows by a building on his own premises, and she is not in effect concerned in the means by which such effect is produced, whether by a building or other structure; nor is she concerned as to the motive, nor as to whether he makes or loses by the operation. In the one case she might have a strong suspicion of his malice, while in the other such suspicion would be ripened into a certainty. But

this is nothing to her as affecting a property right. As long as he keeps on his own property, and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced, and to permit her to do so, would not be enforcing a right of property, but a rule of morals. It would be controlling and directing his moral conduct by a suit in equity, by an injunction.

To permit a man to cause a certain injurious effect upon the premises of his neighbor by the erection of a structure on his own premises if such structure is beneficial or ornamental, and to prohibit him from causing the same effect in case the structure is neither beneficial nor ornamental, but erected from motives of pure malice, is not protecting a legal right, but is controlling his moral conduct. In this state a man is free to direct his moral conduct as he pleases, in so far as he is not restrained by statute.

But it is said that such acts are offensive to the principles of equity. Not so. There is no conflict between law and equity in our practice, and what a man may lawfully do cannot be prohibited as inequitable. It may be immoral, and shock our notions of fairness, but what the law permits, equity tolerates. It would be much more inequitable and intolerable to allow a man's neighbors to question his motives every time that he should undertake to erect a structure upon his own premises, and drag him before a court of equity to ascertain whether he is about to erect the structure for ornament or profit, or through motives of unmingled malice.

The case is not like annoying a neighbor by means of causing smoke, gas, noisome smells, or noises to enter his premises, thereby causing injury. In such cases something is produced on one's own premises and conveyed to the premises of another; but in this case nothing is sent, but the air and light are withheld. A man may be compelled to keep his gas, smoke, odors and noise at home, but he cannot be compelled to send his air and light abroad. *Mullen v. Stricker*, 19 Ohio St. 135.

If smoke, gas, offensive odors, or noise pass from one's own premises to or upon the premises of another to his injury, an action will lie therefor, even though the smoke, gas, odor or noise should be caused by the lawful business operations of defendant and with the best of motives. *Broom's Legal Maxims*, 372.

But it is strongly urged by counsel for defendant in error, that the maxim, "Enjoy your own property in such a manner as not to injure that of another person," applies in such cases as this, and that as it must be conceded that the fence in question is an injury to the property of defendant in error, that his acts are in conflict with the above maxim.

At first blush this would seem to be so, but a careful consideration shows the contrary. The maxim is a very old one, and states the law too broadly. In this case, for instance, it is conceded that the plaintiff in error had the right to enjoy his property by erecting a house so as to do the same injury which was done by the fence, and that while that would be an injury to the property

of defendant in error, she would be without remedy, and his act in erecting such house would not be regarded as violating the maxim.

In *Jeffries v. Williams*, 5 Exch. 797, it was claimed, and in *Railroad Company v. Bingham*, 29 Ohio St. 369, it was held, that the true and legal meaning of the maxim is, "So use your own property as not to injure *the rights* of another." Boynton, J., in that case says: "Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong." The maxim should be limited to causing injury to the *rights* of another, rather than to the *property* of another, because for an injury to the rights of another there is always a remedy, but there may be injuries to the property of another for which there is no remedy, as in draining a spring or well, or cutting off light and air or a pleasant view by the erection of buildings, and many other cases which may be cited.

Thus limiting the maxim to the *rights* of the defendant in error, it is plain that the acts of plaintiff in error in the use which he made of his property did not injure any legal right of hers, and that therefore what he did, was not in violation of such maxim.

Judgment reversed.¹

BARGER v. BARRINGER.

Supreme Court of North Carolina, 1909. 151 N. Car. 433.

BROWN, J. The plaintiff's evidence in this case tends to prove that the premises of plaintiff and defendant adjoin, and that they mutually constructed a 4-foot wire fence on the division line; that thereafter the plaintiff, as chief of police of the town of West Hickory, was compelled by his duty to report the filthy condition of defendant's stables; and from pure, unadulterated vengeance and malice the defendant erected a very rude, unsightly board fence, 8 feet, 6 inches high on his side of the division fence, and within 4 feet of plaintiff's windows, which cuts off plaintiff's view, air and light; so much so that plaintiff testifies he cannot see how to shave by sunlight since the fence was built. His Honor's ruling was based upon what we admit to be the generally received view of the common law of England; that the erection of a fence upon one's own land is not actionable injury to one's neighbor, although he may be

¹ *Accord*: Lord Penzance in *Capitol and Counties Bank v. Henty*, L. R. 7 A. C. 741 (1882), p. 766, *semble*; *Giller v. West*, 162 Ind. 17 (1903); *Bordeaux v. Greene*, 22 Mont. 254 (1898); *Brostrom v. Lauppe*, 179 Mass. 315 (1901); *Mahan v. Brown*, 13 Wend. 261 (N. Y. 1835), where, however, it was assumed that the plaintiff might acquire an easement for light and air over the defendant's adjoining land unless the latter shut off his windows; *Pickard v. Collins*, 23 Barb. 444 (N. Y. 1856); *Levy v. Brothers*, 4 Misc. 48 (N. Y. 1893); *Koblegard v. Hale*, 60 W. Va. 37 (1906); *Metzger v. Hochrein*, 107 Wis. 267 (1900), and see *Lapere v. Luckey*, 23 Kans. 534 (1880); *Triplett v. Jackson*, 5 Kans. App. 777 (1897); *Guest v. Reynolds*, 68 Ill. 478 (1873); *Honsel v. Conant*, 12 Ill. App. 259 (1882), and compare *Shell v. Kemmerer*, 13 Phila. 502 (Pa. 1877).

deprived of light and air thereby, and the act may be dictated by motives of ill-will. Counsel for plaintiff does not deny the general proposition that one has a right to improve his property as he sees fit, and that resultant injury would be *damnum absque injuria*. But it is contended that if one in the use of his property is actuated solely by a malicious purpose to injure his neighbor, with no benefit accruing to himself, he will not be permitted to use his property for such an unworthy purpose. It must be admitted that this proposition embodies good morals, and we think it is supported by recognized authority and well-considered precedents. We are therefore disposed to follow those courts which, in this respect, teach that the principle of the common law, above stated, should not be held to authorize the creation and maintenance of a nuisance for the sole purpose of gratifying a most ignoble passion. There are respectable authorities in this country which support the view that malice makes that actionable which would otherwise not be so, and the doctrine has been held to be well founded, both in law and morals, that "a fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, is a nuisance." 12 Am. & Eng. Enc. Law, 2d ed. p. 1058, and cases cited in note; 1 Cyc. Law & Proc. p. 789.

This question came before the Supreme Court of Michigan in 1888, and the court was equally divided. An elaborate and well-reasoned opinion was delivered by Justice Morse (*Burke v. Smith*, 69 Mich. 383), from which we cannot do better than quote at length: The learned justice says: It is argued "that, while it is true that when one pursues a strictly legal right, his motives are immaterial, yet no man has a right to build and maintain an entirely useless structure for the sole purpose of injuring his neighbor. The argument has force, and appears irresistible in the light of the moral law that ought to govern all human action. And the civil law, coming close to the moral law, declares that 'he who, in making a new work upon his own estate, uses his right without trespassing, either against any law, custom, title, or possession which may subject him to any service toward his neighbors, is not answerable for the damages which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others, without advantage to himself.' Thus the civil law recognizes the moral law, and does not permit the owner of land to do an act upon his own premises for the express purpose of injuring his neighbor, where the act brings no profit or advantage to himself. The law furnishes redress, because the injury is malicious and unjustifiable. The moral law imposes upon every man the duty of doing unto others as he would that they should do unto him; and the common law ought to, and in my opinion does, require him to so use his own privileges and property as not to injure the rights of others maliciously and without necessity. It is true that he can use his own property, if for his own benefit or advantage, in many cases, to the injury of his neighbor; and such neighbor has no redress, because the owner of the property is exercising a legal right which

infringes on no legal right of the other. Therefore, and under this principle, the defendant might have erected a building for useful or ornamental purposes, and shut out the light and air from complainant's windows, but when he erected these 'screens' or 'obscurers' for no useful or ornamental purpose, but out of pure malice against his neighbor, it seems to me a different principle must prevail. I do not think the common law permits a man to be deprived of water, air, or light for the mere gratification of malice. No one has an exclusive property in any of these elements, except as the same may exist or be confined entirely on his own premises."¹ The same principle has been applied by other courts where the owner of land upon which there is an underground spring of water attempts to cut off the underground flow from his neighbor. It is held generally that any person might rightfully appropriate the whole of the water from the spring on his own land, or of water which percolates through it, without forming a well-defined stream. Hale, Torts, p. 425; *Roath v. Driscoll*, 20 Conn. 533. Nevertheless, there are able courts which hold that if such appropriation is maliciously done to injure a neighbor, it is actionable. Hale, p. 426; *Wheatley v. Baugh*, 25 Pa. St. 528, and cases cited. We fail to see why this principle should not apply with equal force to light and air, especially in a state where no prescriptive rights can be acquired in windows. Justice Morse in his admirable opinion already cited, asks this pertinent question: "If a man has no right to dig a hole upon his premises, not for any benefit to himself or his premises, but for the express purpose of destroying his neighbor's spring, why can he be permitted to shut out air and light from his neighbor's windows maliciously, and without profit or benefit to himself?"

Light and air are as much a necessity as water, and all are the common heritage of mankind. While, for legitimate purposes, a person's rights in them may sometimes be curtailed without consulting his comfort or convenience, the common welfare of all forbids that this should be needlessly permitted in order to gratify one of the basest and most degrading passions that sometimes takes possession of the human heart. The law would be untrue to its soundest principles if it declared that the wanton and needless infliction of injury can ever be a legal right. Instead of saying that malice will not make a lawful act unlawful, it is much more consistent with elementary principles of right and wrong to say that wilful and wanton damage done to another is actionable unless

¹"This opinion was approved by a unanimous court, the personnel of which had been changed in 1890, in the case of *Flaherty v. Moran*, 81 Mich. 52, in which it was held that a fence erected maliciously, and with no other purpose than to shut out light and air from a neighbor's windows, is a nuisance. This ruling was again unanimously approved in 1893 by the Michigan court, although its membership had again been changed, in *Kirkwood v. Finegan*, 95 Mich. 543, and again in *Kusniak v. Kosminski*, 107 Mich. 444. In 1896 the same court, again differently constituted, unanimously followed and approved those precedents. *Peck v. Roe*, 110 Mich. 52; *Sankey v. St. Mary's Female Academy*, 8 Mont. 267; *Havens v. Klein*, 49 How. Pr. 95 (N. Y.)."

there is some just or legal cause or excuse for it. An eminent English judge has declared this to be a general rule of English law in these words: "At common law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just excuse." Lord Justice Brown, in *Skinner v. Shew*, (1893) 1 Ch. 422.²

In the administration of the criminal law, the motive with which an act is committed has a marked effect upon the guilt of the accused, and in determining the degrees of crime. Why not, for the same reasons, let it become a potent element in determining civil rights, so as to deter malicious persons from the infliction of wanton injury upon their fellow men? This involves no harmful restriction upon the right of ownership of property. There are many limitations placed by the common law upon such rights, and we see no difficulty in principle in limiting an owner's rights so far that he shall not be permitted to use his land in a particular way with no other purpose than to damage his neighbor. This has been done without injurious effect, in the matter of so-called "spite fences," by some of the most enlightened states of this Union, which have remedied by legislation the errors of the courts in failing to recognize this "fundamental doctrine of the rights of man," when dealing with this kind of injury. In cases brought under such statutes, the courts have declared that malevolence must be the dominant motive, without which the fence would not have been built, in order to bring the case within the statute. 12 Am. & Eng. Enc. Law, p. 1058, and cases cited; *Lord v. Langdon*, 91 Me. 221; *Rideout v. Knox*, 148 Mass. 368; *Smith v. Morse*, 148 Mass. 407; *Hunt v. Coggin*, 66 N. H. 140.³ If the right to use one's property, solely for malicious purposes, in a manner which would be lawful for other ends, is a legal right, and an incident to the legal exer-

²"Mr. Justice Holmes, delivering the opinion of the Supreme Court of the United States, stated the same rule more fully: 'It has been considered that prima facie the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification, if the defendant is to escape. * * * If this is the correct mode of approach, it is obvious that justifications may vary in extent according to the principles of policy upon which they are founded; and that while some, for instance, at common law, those affecting the use of land, are absolute, * * * others may depend upon the end for which the act is done.' *Aikens v. Wisconsin*, 195 U. S. 194; Pollock, Torts, 7th ed. 319. See also, 22 Law Quarterly Rev. (1906) p. 118."

³The statutes of California, Maine, Massachusetts and New Hampshire declare "fences or similar structures" exceeding a certain height "enclosed or maintained with the malicious purpose of annoying the owner or occupant of adjacent premises" to be private nuisances. Such statutes do not apply to buildings other than those on or near the division line between the two premises, *Ingwersen v. Barry*, 118 Cal. 342 (1897); *Brostrom v. Lauppe*, 179 Mass. 315 (1901). In Connecticut and Washington it is provided that injunctions may be granted to retain the "malicious erection or maintenance of any structure intended to spite, injure or annoy an adjoining proprietor", *Gallagher v. Dodge*, 48 Conn. 387 (1880); *Karasek v. Peier*, 22 Wash. 419 (1900). While in Vermont, the erection or maintenance of "an unnecessary fence or other structure" for such purpose is forbidden under penalty of a fine, and the selectmen are empowered to remove it after notice to the evictor and his failure to remove it himself, *Holmes v. Fuller*, 68 Vt. 207 (1896).

cise of such property which the courts ought not and cannot rightfully deny, how can such right be taken away by legislation, as legislatures, no more than courts, have power of confiscation? Yet these statutes have been upheld by the courts and approved by the people of those states wherein they have been enacted. The truth is that the right to use one's property for the sole purpose of injuring others is not one of the immediate and indestructible rights of ownership, and such acts may and ought to be prohibited by courts without the aid of legislation.⁴

We are aware that this court has recognized the general principle that malice, disconnected with the infringement of a legal right, is not actionable, as in *Richardson v. Wilmington & W. R. Co.*, 126 N. Car. 100, where the master discharged his servant, there being no fixed term of employment. It was properly held, the present chief justice speaking for the court, that as either party had the legal right to terminate the service at will, the motive could not be inquired into. We also adhere to the law as declared in *Lindsay v. First Nat. Bank*, 115 N. Car. 553, that in this country the easement of light and air cannot be acquired by prescription,⁵ upon which ground this court refused to enjoin the erection of a building, one wall of which excluded the light from plaintiff's photograph gallery. There was no allegation that the obstruction was useless and erected for malicious purposes solely. The difference between these cases and this is apparent upon even a cursory reading.

We are not aware that this court has ever extended the rights of ownership in property so far as to authorize an owner to use it for the express purpose of creating a nuisance and no other; and, if it had, in the light of further investigation, we should feel impelled to hold the case not well decided. There are many annoyances arising from legitimate improvements and businesses which those living near must endure, but no one should be compelled by law to submit to a nuisance created and continued for no useful end, but solely to inflict upon him humiliation, as well as physical pain. The ancient maxim of the common law, *Sic utere tuo ut alienum non laedas*, is not founded in any human statute, but in that sentiment expressed by Him who taught good will toward men, and said, "Love thy neighbor as thyself." Freely translated, it enjoins that every person, in the use of his own property, should avoid injury to his neighbor as much as possible. No one ought to have the legal right to make a malicious use of his property for no benefit to him-

⁴ See *Horan v. Byrnes*, 72 N. H. 93 (1903), accord. Such acts have been held constitutional in *Rideout v. Knox*, 148 Mass. 368 (1889), and *Karasek v. Peier*, 22 Mont. 419 (1900), though it was intimated that an act prohibiting an owner erecting a store or house or other useful structure, though its erection was inspired by a desire to injure an adjoining proprietor; see *Jones v. Williams*, 56 Wash. 588 (1910). The reasoning in *Huber v. Merkel*, 117 Wis. 355 (1903), would require that such statutes should be held unconstitutional in Wisconsin.

⁵ Accord: *Guest v. Reynolds*, 68 Ill. 478 (1873); *Keats v. Hugo*, 115 Mass. 204 (1880), *semble*, and cases cited therein; *Rennyson's Appeal*, 94 Pa. 147 (1880); *Parker v. Foote*, 19 Wend. 309 (N. Y. 1838).

self, but merely to injure his fellow man. To hold otherwise makes the law an engine of oppression with which to destroy the peace and comfort of a neighbor, as well as to damage his property for no useful purpose, but solely to gratify a wicked and debasing passion. The doctrine of private nuisances is founded upon this humane and venerable maxim of the law. If it can be successfully invoked to prevent the keeping of stables and hogpens so near one's neighbor as to cause discomfort, why cannot he whom it is sought to needlessly and maliciously deprive of air and sunlight also seek the *aegis* of its protection? The right thus to injure one's neighbor with impunity cannot long continue to exist anywhere in an enlightened country where God is acknowledged and the Golden Rule is taught. On this subject, if need be, we will do better to follow the pandects of the heathen Roman, whose jurists have inculcated a doctrine more consistent with the teachings of Him whom they permitted to be crucified, than to be governed by the principles of the common law as expounded by some Christian courts and text writers.

The judgment of nonsuit is set aside, and the cause remanded, to be proceeded with in accordance with the principles laid down in this opinion.*

New trial.

HOKE, J., dissenting. We are all, I trust striving, at times somewhat blindly, to attain to the perfect righteousness of the great Teacher as well as Saviour of men, but in the present stage of our development, and with our limited, human ken, it has been found best to confine litigation in our civil courts to the enforcement of rights, and the redress of wrongs growing out of an invasion of those rights, done or threatened, and not allow causes of action to be based upon motive alone. For here we enter upon the domain of taste and temperament, involving questions entirely too complex, varied, and at times fanciful for satisfactory inquiry and determination by municipal courts. In a case so near the border line as to divide this court on a fundamental question as to rights of property, it is well to recur to the facts. The plaintiff, a chief of police, and owner of a house and lot, on complaint made, has caused the defendant to remove his stable from an adjoining piece of property. The defendant, smarting under a sense of defeat, makes

* *Accord: Smith v. Speed*, 11 Okla. 95 (1901), proceeding to punish as contempt the erection of a "spite fence" restrained by a District Court; and see the charge of the trial court in *Haverstick v. Sipe*, 33 Pa. 368 (1859). In *Metz v. Tierney*, 13 N. Mex. 363 (1906), the court refused to express any opinion on the point, holding that the fence or screen in question was erected for a legitimate purpose, to protect the privacy of his premises, as to this see *accord: McCorkle v. Driskell*, 60 S. W. 172 (Tenn. 1900); *Shell v. Kemmerer*, 13 Phila. 502 (Pa. 1879); *Haverstick v. Sipe*, 33 Pa. 368 (1859), *semble*, and compare *Burke v. Smith* with *Flaherty v. Moran*, 81 Mich. 52. For the law of France, Germany and Switzerland and the civil law on the subject, see "Motive as an Element in Torts in the Common and in the Civil Law" by F. P. Walton, Esq., of McGill University, Montreal, 22 Harv. L. R. 501 (1909), a very valuable discussion on the whole subject indicted in the title of the article, especially p. 502, citing *Doerr v. Keller*, Court of Colmar, Dalloz, 1856, 2, 9; *Sirey*, 1904, 2, 217.

some hasty and ill-considered expressions, erects a fence on his own land, and in the protection of his own property. He is now brought into court on the charge that the fence has been constructed from malicious motives; that it is too high; the planks are rough and undressed; and the house of plaintiff, presumably one room of it, has been rendered so dark that he cannot see how to shave. If plaintiff can succeed in this, the next grievance will very likely be found in the shape of the roof or the color of the paint, and the defendant, who had supposed that he was the owner of a piece of property, no doubt descended to him from his fathers, will find that in the evolution of things modern he is only an occupant, holding subject to the capricious whims of some supersensitive and overly æsthetic but influential neighbor.

I am of opinion that no cause of action has been stated in the complaint or in the evidence, and that the judgment of nonsuit should be sustained.

MANNING, J., concurs in the dissenting opinion.

' HORAN v. BYRNES.

Supreme Court of New Hampshire, 1903. 72 N. H. 93.

Case, under sections 28 and 29, chapter 143, Public Statutes, for maintaining a structure in the nature of a fence, in violation of the statute.

Upon the trial, defendant moved for a nonsuit, on the ground that the statute is unconstitutional. The motion was denied, and defendant excepted.

PARSONS, C. J. The act forbids the use by one landowner of his land for the unnecessary erection of a fence exceeding five feet in height, when the purpose of such unnecessary height is the annoyance of the adjoining owner or occupant, if such unnecessary height injures the adjoining owner in his comfort or the enjoyment of his estate. The claim of the defendant in support of his motion for a nonsuit, that the statute is unconstitutional, raises the question whether the statutory prohibition is an interference with the defendant's "natural, essential, and inherent" right of "acquiring, possessing, and protecting property," or deprives him of that protection in its enjoyment, which is the right of "every member of the community." Bill of Rights, *arts. 2, 12*.

"While one may in general put his property to any use he pleases not in itself unlawful, his neighbor has the same right to the undisturbed enjoyment of his adjoining property. * * * What standard does the law provide? * * * Whatever may be the law in other jurisdictions, it must be regarded as settled in this state that the test is the reasonableness or unreasonableness of the business in question under all the circumstances." *Ladd v. Brick Co.*, 68 N. H. 185, 186. "The common-law right of the ownership of land, in its relationship to the control of surface water, as un-

derstood by the courts of this state for many years, does not sanction or authorize practical injustice to one landowner by the arbitrary and unreasonable exercise of the right of dominion by another" (*Franklin v. Durgee*, 71 N. H. 186), but makes the test of the right the reasonableness of the use under all the circumstances. In such case the purpose of the use, whether understood by the landowner to be necessary or useful to himself, or merely intended to harm another, may be decisive upon the question of right. It cannot be justly contended that a purely malicious use is a reasonable use. The question of reasonableness depends upon all the circumstances—the advantage and profit to one of the uses attacked, and the unavoidable injury to the other. Where the only advantage to one is the pleasure of injuring another, there remains no foundation upon which it can be determined that the disturbance of the other in the lawful enjoyment of his estate is reasonable or necessary. There is no sound ground upon which a distinction can be made against the plaintiff's right to use his land for the enjoyment of the air and light which naturally come upon it, in favor of his right to use it to enjoy the waters which naturally flow upon or under it, except the fact that the use of land for buildings necessarily cuts off air and light from the adjoining estate. The fact that the improvement of real estate in this way for a useful purpose, universally conceded to be reasonable, may affect the adjoining owner's enjoyment of his estate to the same extent as a like act done solely to injure the other, is not a sufficient reason for distinguishing the right to build upon the surface from the right to dig below it or to control the surface itself. Jurisdictions which reject the doctrine of reasonable necessity, reasonable care, and reasonable use, which "prevail in this state in a liberal form, on a broad basis of general principle" (*Haley v. Colcord*, 59 N. H. 7), as applied to the ownership of real estate, in favor of the principle of absolute dominion, may properly consider a malicious motive immaterial upon the rightfulness of a particular use; but in this state, to do so would be to reject the principle announced in *Bassett v. Company*, 43 N. H. 569, and repeatedly reaffirmed during the last forty years.

But the landowner's right in the enjoyment of his estate being that of reasonable use merely, there attaches at once to each the correlative right not to be disturbed by the malicious, and hence unreasonable, use made by another. To hold that a right is infringed because, by the noxious use made by another, the air coming upon a landowner's premises is made more or less injurious, and to deny the invasion of a right by an unreasonable use which shuts off air and light entirely, is an attempt to bound a right inherent and essential to the common enjoyment of property by the limitations of an ancient form of action. An unreasonable use of one estate may constitute a nuisance by its diminution of the right of enjoyment of another, without furnishing all the elements necessary to maintain an action *quare clausum fregit*. As, therefore, the statute does not deprive the plaintiff of any right to a reasonable use of his land, but only prohibits an unnecessary, unreasonable use, it does not

deprive him of any property right. Hence it is not necessary to inquire whether, as an invasion of property rights, the limitation of the statute is one which might properly be made for the general good.

* * * * *

The objection based upon the unconstitutionality of the statute is not sustained, and the exception to the denial of the motions for a nonsuit and to direct a verdict upon that ground is overruled.

GALLAGHER v. DODGE.

Supreme Court of Errors, Connecticut, 1880. 48 Conn. 387.

LOOMIS, J. This is a petition for an injunction under the statute (Gen. Statutes, p. 477, sec. 4) which provides that "an injunction may be granted against the malicious erection by an owner or lessee of land of any structure upon it intended to annoy and injure any proprietor of adjacent land in respect to his use or disposition of the same."

The structure which it is sought to enjoin the defendants against erecting, is a show-case in front of their store and upon their own premises, but to be so placed as to obstruct a side window in the plaintiff's store, which store projects several feet beyond that occupied by the defendants, and thus has space for a side window looking out upon the platform constructed from the front of the defendants' store to the street line. This side window is upon the line between the premises of the two parties, and serves the occupant of the plaintiff's store both for light and for the display of his goods.

It is found that the object of the defendants in procuring the show-case was two-fold—first, to display their own goods to the best advantage; and second, to prevent the public from seeing the goods of the occupant of the plaintiff's store through his side window.

It was the right of the defendants, and the exercise of the right could not be regarded as unreasonable, to occupy the space between the front of their store and the street line in the way most advantageous to their business. They were under no obligation to consult the interests of an adjoining proprietor. So far as he was availing himself of the open space to secure to himself more light by a window looking out upon it, or an opportunity to display his goods by exposing them in the window, he was availing himself of an opportunity that he held, and must have known that he held, by mere sufferance, for the defendants' store could at any time have been built out in front up to the street line, and so as completely to darken his side window, with no invasion of his rights and no ground of complaint on his part. If possibly a building line established by the city would have prevented them from building out to the street line, the mere fact that the plaintiff's building was erected before the building line was established was one that gave

him no rights against the defendants as to the open space in front of their premises. What they might have done so effectually by building out over this space they had an equal right to do in any other mode no more injurious to the adjoining proprietor. We cannot see why they might not reasonably do it in the mode which they adopted.

But it is claimed that the whole character of the act as to its legality is changed by the fact that an element of malice went into it. And this brings us to the difficult question where the line shall be drawn between structures that are useful and proper in themselves, but into the erection of which a subordinate malicious motive enters, and those where the malicious intent is the leading feature of the act, and the possible usefulness of the structure a mere incident.

The only case in which this statute has come up for construction is that of *Harbison v. White*, 46 Conn. 106, in which it was held that a coarse structure erected for the malicious purpose of darkening the windows of a neighbor fell within the intent of the statute, although it might serve a useful purpose in screening the defendants' premises from observation. Here the malicious purpose was altogether the predominant one, and the usefulness of the structure very limited and merely incidental. In the present case these conditions are reversed, and it is found that the primary purpose was the reasonable and proper one of displaying the defendants' goods, while the malicious part of the motive was secondary. While we are not prepared to say that this relation of the two motives should always determine the court against the granting of an injunction, and the opposite relation in favor of granting one, yet we regard the predominance of the malicious motive as generally essential to a case in which the court will think itself justified in interfering. The statute speaks of the structure intended as a "malicious erection," and one the intent of which is "to annoy and injure any proprietor of adjacent land." We think we do not go too far in saying that this malicious intent must be so predominating as a motive as to give character to the structure.¹ It must be so manifest and positive that the real usefulness of the structure will be as manifestly subordinate and incidental. The law regards with jealousy all attempts to limit the use to which a man may put his own property. This right to use is always subject to the wholesome limitation of the common law, that every one must so use his own property as not to injure another's, and the person who violates this rule is liable to the person injured whether he has any malicious intent or not; but here the new principle is introduced, that the landowner may erect no structure on his own premises, however lawful it would otherwise

¹ See *Kirkwood v. Finegan*, 95 Mich. 543 (1893), where it was held that the character and style of the building was such as to show "the motive which prompted its erection"; and *Park, J., in Metz v. Tierney*, 13 N. Mex. 363 (1896). "It may be that a structure of this kind" (a rude screen put up to shut off the defendant's windows from observation) "might under some circumstances, be so grossly unsuited or disproportionate to the uses claimed for it as to amount to proof of malice."

be, if he does it maliciously, with intent to annoy his neighbor. The common law has always regarded the existence of malice in the exercise or pursuit of one's legal rights as of no consequence; just as its absence is of no consequence in the cases of injury caused by wrongful acts. The inquiry into and adjudication upon a man's motives has always been regarded as beyond the domain of civil jurisprudence, which resorts to presumptions of malice from a party's acts instead of inquiring into the real inner workings of his mind. When, therefore, we inquire how far a man was actuated by malice in erecting a structure upon his own land, we are inquiring after something that it will always be very difficult to ascertain, unless we adopt, as in other cases where the courts inquire after malice, a presumption of malice from the act done. And in this view of the matter we think no rule can be laid down that is on the whole more easy of application, than that the structure intended by the statute must be one which from its character, or location, or use, must strike an ordinary beholder as manifestly erected with a leading purpose to annoy the adjoining owner or occupant in his use of his premises. If the defendant has erected a house or block on his own land, so close to the dividing line between his lot and his neighbor's as to darken the side windows of his neighbor's house, no one would say that he had done a thing that was mainly intended to annoy his neighbor, and yet in his heart there may have been a malicious delight at the damage he was doing his neighbor. In such a case the obvious propriety of such an erection should determine the question in favor of the party making it, without putting him under oath as to his motives. In the same way, if a landowner should locate a privy or pig-sty directly on his line, and as close as possible to the near parlor windows of his neighbor,² or should erect a rough screen of boards before his windows to darken them, the very character and location of the structures would strike every beholder as decisive evidence of an intent to annoy, and of this intent as an entirely predominant one; and a court might very properly so determine without leaving the case to rest on proof, generally the party's own oath, that there was no malice in the case.

Applying this rule to this case it is very questionable whether any ordinary observer would not see, in the structure here complained of, one which the defendants might reasonably erect, as a proper means of exhibiting their own goods, and a proper use of the space in front of their store, which was theirs for every reasonable and legitimate use, and therefore one of which the plaintiff has no right to complain; while the intent to annoy the occupant of the plaintiff's store, though found as a fact, and though without the show-case might not have been procured, was really subordinate to the legitimate purpose. But whether or not an ordinary observer

² Compare *Kuzniak v. Kozminski*, 107 Mich. 444 (1895), holding that if the structure, a shed used by tenants for storing coal, serves a useful purpose, "while there may have been some malice displayed in putting it so near the complainant's house as to shut off some of the light, that would not be a sufficient reason on which to found a right in complainant to have the building removed."

would have so regarded the structure, the court has here found as a fact, upon what evidence it does not appear, that the primary object of the defendants was the legitimate one of displaying their goods, and the intent to annoy the neighbor only a secondary one. And we think it therefore, considering all the circumstances, a case that falls within the line, which we do not attempt to define with exactness, that divides structures that the court will not interfere with from those against which the statute intended to furnish a protection.

There is a feature of this case that we ought perhaps to notice more particularly. The occupant of the plaintiff's store and the defendants were rivals in business. It was the right of each not only to show his own wares to the best advantage, but also to prevent the other from getting any advantage in the exhibition of his to which he was not legally entitled. While such competition in all business tends to benefit the public, there are yet many things done in it that are by no means commendable, and which often belong to a low level of morality, but which are yet beyond the control of law. The act of the defendants in this case was, at the worst, of that character. So far as it was intended to annoy the occupant of the plaintiff's store it was not so much from malice, as we ordinarily understand that term, and as we think it is to be understood in the statute, as from a spirit of competition in business—of ill will perhaps—yet not so much against the object of it as an individual as against him as a rival in business. We do not mean to say that such acts may not be carried so far as to fall within the condemnation of the statute, but we think that, to do so, they must as a general rule go quite beyond the petty hostilities of business competition.

A question was made by the defendants whether the action could be maintained by the plaintiff, as owner of the premises, while the acts complained of were directed wholly against his lessee, who was occupying the store, and whose business, it was claimed, was injured by them. In the view we have taken of the case we have not thought it necessary to consider this question. We have treated the case as if the plaintiff had himself been the occupant.

There is no error in the judgment complained of.

In this opinion the other judges concurred.³

³ In *Ridcut v. Knox*, 148 Mass. 368 (1889), it was held that the desire to injure must be the dominant motive. "A man," says Holmes, J., "cannot be punished for malevolently maintaining a fence for the purpose of annoying his neighbor, merely because he feels pleasure at the thought that he is giving annoyance, if that pleasure alone would not induce him to maintain it for other reasons, if that pleasure was denied him. If the height above six feet is really necessary for any reason, there is no liability, whatever the motives of the owner in erecting it." Accord: *Lord v. Langdon*, 91 Maine 221 (1898), and compare *Hunt v. Coggin*, 66 N. H. 140 (1889). But it is not necessary that the purpose to annoy should be the sole motive, *Healey v. Spaulding*, 104 Maine 122 (1909). In *Jones v. Williams*, 56 Wash. 588 (1910), it is held that if the structure enhances "the value, usefulness or enjoyment of land" it is not a nuisance, no matter how malicious the owner's purpose in erecting it; and see *Kuzniak v. Kozminski*, 107 Mich. 444 (1895).

HOLBROOK v. MORRISON.

Supreme Judicial Court of Massachusetts, 1913. 214 Mass. 209.

MORTON, J. The plaintiffs are dealers in real estate and own a number of lots on Wellington Hill in the Dorchester District of the City of Boston. The defendant owns a house and lot abutting on two of the lots belonging to the plaintiffs and in close proximity to the others. She has caused to be placed on the front of her house a large sign headed with the words "For Sale," and concluding with the words "Best offer from Colored Family," all in large letters. The first entrance on to Wellington Hill and the way prospective purchasers would take in going there is past her house. She has also caused, it is alleged, advertisements of a like tenor to be inserted in the "Boston Globe," a newspaper of large circulation, and has threatened and is threatening to sell her house and lot to a colored family. This is a bill to restrain the defendant from maliciously interfering with the plaintiffs' business by means of such sign and advertisements and by such threats. The bill alleges that the effect of the defendant's acts has been greatly to injure the sale of the plaintiffs' lots and that the defendant's purpose is to injure the plaintiffs' business, and that she had no real intention of selling her house and lot to members of the negro race.

The case was heard by a single justice, Loring, J., and comes here on a report by him of the evidence and of a finding made by him "that the defendant did not put up the sign for the sole purpose of selling her property, but that she did it for the purpose of annoying the plaintiffs." This finding was made by the single justice "without going into the question of whether she (the defendant) was justified in having that ill feeling;" and the report concludes, "such decree to be entered by the court as justice and equity may require."

It appeared from the uncontradicted evidence that the threatened sale by the defendant of her house and lot to a colored family has injured and will continue to injure the business of the plaintiffs unless prevented. We interpret the finding made by the single justice as meaning that one purpose which the defendant had in putting up the sign and in advertising her property as she did was to sell it. She also had the purpose, as he finds, of annoying the plaintiffs.

There can be no doubt that the defendant has the right to advertise her property for sale by signs or otherwise in the usual way, and to sell it if she sees fit to a negro family, even though the effect may be to impair the business of the plaintiffs; just as, for instance, the owner of land on a hillside may cultivate it in the usual way even though the effect of the surface drainage may be to fill up his neighbor's mill pond below. *Middlesex Co. v. McCue*, 149 Mass. 103. Does the presence in the sign and advertisements of a malevolent motive *quoad* the plaintiffs, although they are not named, intended to annoy and in fact annoying and injuring the plaintiffs' business by announcing in effect, that the property is for sale to a

colored family change what otherwise would be a legal right into an actionable wrong? It would seem clear according to our own decisions that it does not. *Rideout v. Knox*, 148 Mass. 368. *Greenleaf v. Francis*, 18 Pick. 117. *Walker v. Cronin*, 107 Mass. 555. See also *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *Mahan v. Brown*, 13 Wend. 261. In the present case it is plain, as we have said, that the defendant has the right, if she sees fit to do so, to sell her house and lot to a negro family whatever the effect may be upon the plaintiffs' business and property. If she had put up the sign and had caused the advertisements to be inserted without any such intention as alleged in the bill of selling her property but solely with the purpose of injuring the business and property of the plaintiffs, there can be no doubt that such conduct on her part would have been actionable. As was said in *Rideout v. Knox*, 148 Mass. 368, 372, "the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership." But as we have construed the finding of the single justice, one of her purposes in putting up the sign was to sell her property, which was a lawful purpose and one of the indefeasible rights of ownership.¹

SECTION 3.

The Right to appropriate the Benefit of Natural Resources Common to Several Landowners.

CORPORATION OF BRADFORD v. PICKLES.

Court of Appeals, 1894. L. R. 1895, Ch. Div. 145.
House of Lords, 1895. L. R. 1895, App. Cas. 587.

LINDLEY, L. J. The plaintiffs in this case are (*inter alia*) a waterworks company, and they want water. The defendant is the owner of some land which is full of water which he does not want. This water supplies some wells which belong to the plaintiff, and, if cut off by the defendant, will materially diminish the water which the plaintiffs will be able to pump. The defendant says to the plaintiffs, "If you want me to supply you with water you must pay me for it, and if you will not pay me what I want, you shall not have the water from my land, and I will cut it off." The defendant and the plaintiffs being unable to come to terms, the defendant has begun to construct works which, if completed, will cut off, or at all

¹ See *Falloon v. Schilling*, 29 Kans. 292 (1883), where the court refused to restrain the defendant, who had quarreled with the plaintiff because he had refused to sell his adjoining property to the defendant, from erecting near the division line small tenements to be rented to negroes.

events greatly diminish, the plaintiff's supply. The plaintiffs thereupon bring this action and apply for an injunction, which Mr. Justice *North* has granted. The defendant has appealed; and this Court has now to decide whether the injunction can be maintained or not.

I entirely concur in the view taken by Mr. Justice *North* of the conduct of the defendant. He does not want the water himself, nor does he want to get rid of it in order the better to work his own land. He simply wants to force the plaintiffs to buy his land, or the water coming from it, at his own price, regardless of the interests of other people who will be seriously inconvenienced if the defendant cuts off the supply. But Mr. Justice *North* held, and in my opinion rightly held, that these circumstances are not enough to justify the Court in interfering with the defendant. The only question a Court of Law or Equity can consider is whether the defendant has a right to do what he threatens and intends to do. If he has he cannot be interfered with, however selfish, vexatious, or even malicious his conduct may be: see *Chasemore v. Richards*, 7 H. L. C. 349. This is not one of those in which an improper object or motive makes an otherwise lawful act actionable. It is not like libel or malicious prosecution, or what are called frauds on powers.

Apart from special legislation, the right of the defendant to drain his own land by getting rid of all the water which percolates into and through it underground cannot be denied: see *Chasemore v. Richards* and *Acton v. Blundell*, 12 M. & W. 324, 354; and this is all that he is doing. He is not diverting any defined stream. If, as the plaintiffs say, he is not entitled to do what he intends to do, it must be by reason of some special legislation, and not by reason of the ordinary law of the country.

LORD HALSBURY, L. C. Apart from the consideration of the particular Act of Parliament incorporating the plaintiffs, which requires separate treatment, the question whether the plaintiffs have a right to the flow of such water appears to me to be covered by authority. In the case of *Chasemore v. Richards*, it became necessary for this House to decide whether an owner of land had a right to sink a well upon his own premises, and thereby abstract the subterranean water percolating through his own soil, which would otherwise, by the natural force of gravity, have found its way into springs which fed the River Wandle, the flow of which the plaintiff in the action had enjoyed for upwards of sixty years.

The question was then determined by this House, and it was held that the landowner had a right to do what he had done whatever his object or purpose might be, and although the purpose might be wholly unconnected with the enjoyment of his own estate.

The only remaining point is the question of fact alleged by the plaintiffs, that the acts done by the defendant are done, not with any view which deals with the use of his own land or the percolating water through it, but is done, in the language of the pleader, "maliciously." I am not certain that I can understand or give any intelligible construction to the word so used. Upon this supposition

on which I am now arguing, it comes to an allegation that the defendant did maliciously something that he had a right to do. If this question were to have been tried in old times as an injury to the right in an action on the case, the plaintiffs would have had to allege, and to prove, if traversed, that they were entitled to the flow of the water, which, as I have already said, was an allegation they would have failed to establish.

This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant. But I am not prepared to adopt Lindley L. J.'s view of the moral obliquity of the person insisting on his right when that right is challenged. It is not an uncommon thing to stop up a path which may be a convenience to everybody else, and the use of which may be no inconvenience to the owner of the land over which the path goes. But when the use of it is insisted upon as a right, it is a familiar mode of testing that right to stop the permissive use, which the owner of the land would contend it to be, although the use may form no inconvenience to the owner.

So, here, if the owner of the adjoining land is in a situation in which an act of his, lawfully done on his own land, may divert the water which would otherwise go into the possession of this trading company, I see no reason why he should not insist on their purchasing of his interest from which this trading company desires to make profit.

For these reasons, my Lords, I am of opinion that this appeal ought to be dismissed without costs, and that the plaintiffs should pay to the defendant the costs both here and below.

LORD WATSON. But the appellants pleaded at your Lordships' Bar, as they did in both Courts below, that the principal of *Chasemore v. Richards* is applicable to the present case, because, in the first place, the operations contemplated and commenced by the respondent are by statute expressly prohibited; and, in the second place, these operations were designed and partly carried out by the respondent, not with the honest intention of improving the value of his land or minerals, but with the sole object of doing injury to their undertaking.

The second plea argued by the appellants, which was rejected by both Courts below, was founded upon the text of the Roman law (Dig. lib. 39, tit. 3, art. 1, s. 12), and also, somewhat to my surprise, upon the law of Scotland. I venture to doubt whether the doctrine of Marcellus would assist the appellants' contention in this case; but it is unnecessary to consider the point, because the noble and learned Lords who took part in the decision of *Chasemore v. Richards*, held that the doctrine had no place in the law of England.

I desire, however, to say that I cannot assent to the law of Scotland as laid down by Lord Wensleydale in *Chasemore v. Rich-*

ards, 7 H. L. C. at p. 388. The noble and learned lord appears to have accepted a passage in Mr. Bell's Principles (sect. 966), which is expressed in very general terms, and is calculated to mislead unless it is read in the light of the decisions upon which it is founded. I am aware that the phrase "in aemulationem vicini" was at one time frequently, and is even now occasionally, very loosely used by Scottish lawyers. But I know of no case in which the act of a proprietor has been found to be illegal, or restrained as being in aemulationem, where it was not attended with offence or injury to the legal rights of his neighbor. In cases of nuisance a degree of indulgence has been extended to certain operations, such as burning limestone, which in law are regarded as necessary evils. If a landowner proceeded to burn limestone close to his marsh so as to cause annoyance to his neighbor, there being other places on his property where he could conduct the operation with equal or greater convenience to himself and without giving cause of offence, the Court would probably grant an interdict. But the principle of aemulatio has never been carried further. The law of Scotland, if it differs in that, is in all other respects the same with the law of England. No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious.

I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD ASHBOURNE. Mr. Pickles has acted within his legal rights throughout; and is he to forfeit those legal rights and be punished for their legal exercise because certain motives are imputed to him? If his motives were the most generous and philanthropic in the world, they would not avail him when his actions were illegal. If his motives are selfish and mercenary, that is no reason why his rights should be confiscated when his actions are legal.

LORD MACNAGHTEN. As regards the first point, the position of the appellants is one which is not very easy to understand. They cannot dispute the law laid down by this House in *Chasemore v. Richards*, 7 H. L. C. 349. They do not suggest that the underground water with which Mr. Pickles proposes to deal flows in any defined channel. But they say that Mr. Pickles' action in the matter is malicious, and that because his motive is a bad one, he is not at liberty to do a thing which every landowner in the country may do with impunity if his motives are good. Mr. Pickles, it seems, was so alarmed at this view of the case that he tried to persuade the Court that all he wanted was to unwater some beds of stone which he thought he could work at a profit. In this innocent enterprise the Court found a sinister design. And it may be taken that his real object was to show that he was master of the situation, and to force the corporation to buy him out at a price satisfactory to himself. Well, he has something to sell, or, at any rate, he has something which he can prevent other people enjoying unless he is paid for it. Why should he, he may think, without fee or reward, keep his land as a store-room for a commodity which the corpora-

tion dispense, probably not gratuitously, to the inhabitants of Bradford? He prefers his own interests to the public good. He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher. But where is the malice? Mr. Pickles has no spite against the people of Bradford. He bears no ill-will to the corporation. They are welcome to the water, and to his land too, if they will pay the price for it. So much perhaps might be said in defence or in palliation of Mr. Pickles' conduct. But the real answer to the claim of the corporation is that in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element.¹

BARCLAY v. ABRAHAM.

Supreme Court of Iowa, 1903. 121 Iowa 619.

LADD, J. The particular district within which flowing wells may be obtained at a depth varying from one hundred to two hundred feet is three or four miles in length by about one-half mile in

¹ *Accord: Meeker v. East Orange*, 76 N. J. L. 435 (1908), facts practically identical to *Chasemore v. Richards*; *Chatfield v. Wilson*, 28 Vt. 49 (1855), defendant dug a well which intercepted the percolating water which had previously supplied the plaintiff's well, so causing it to go dry, the defendant's object, or motive as it was called, was held immaterial; *Huber v. Merkel*, 117 Wis. 355 (1903), defendant sank an artesian well which seriously diminished the flow of the plaintiff's well. In *Hague v. Wheeler*, 157 Pa. St. 324 (1893), the owner of land was held to have a similar right to appropriate the natural gas from strata underlying after reducing it to possession, and to use, sell or waste it or to do otherwise what he pleased with it; and see *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317 (1897), *accord: semble*, where, however, the defendant's proposed wells were designed to obtain oil for his own use and sale, the allegation being that by their location near the plaintiff's line, they would enable the defendant to appropriate more than his fair share of the common supply.

In *Smith v. Brooklyn*, 160 N. Y. 357 (1899), it was held that it is wrongful to diminish the waters in a defined surface channel by the appropriation by pumping of the subsurface water on adjacent lands; *contra, Meeker v. East Orange*, 76 N. J. L. 435 (1908); compare *Grand Junction Canal Co. v. Shugar*, L. R. 9 Ch. 493 (1871).

A landowner's right to sub-surface water free from contamination, if not from diminution by reason of his neighbor's actions is recognized in *Ballard v. Tomlinson*, L. R. 29 Ch. Div. 115 (1885), the defendant at a considerable distance (the distance being immaterial) deposited sewage in a disused well which percolated into and polluted the plaintiff's well; *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143 (1890); *Kinnaird v. Standard Oil Co.*, 89 Ky. 468 (1890), compare *New River Co. v. Johnson*, 2 E. & E. 435 (1860).

As to the liability of persons, other than adjacent owners appropriating by operations in their land the water underlying it by diverting the supply of the plaintiff's springs, see *Parker v. Boston & M. R. Co.*, 3 Cush. 107 (Mass. 1849); *Hart v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 488 (1882); *United States v. Alexander*, 148 U. S. 186 (1892), wells drained by the execution of public works or of private operations carried on upon the lands of others under statutes authorizing such operations and providing for the recovery of damages for the harm done thereby; as to the liability of a mere stranger, see *Springfield Water-works Co. v. Jenkins*, 62 Mo. App. 74 (1895).

width, following the direction of the creek. Within this area there are at least eleven wells which are now or have been flowing above the earth's surface. That of plaintiff, near his barn, is one hundred and fifty-two feet deep. The well sunk by defendant is only one hundred and seven feet deep, but on ground about as much lower as the difference. Its casings are three inches in diameter, and the flow, when uninterrupted, has the effect of stopping plaintiff's well and of several others. It is located near the south line of defendant's land, from which the water runs in the creek, and, save that necessary for about thirty head of cattle, is without benefit to him or any one else. The water in excess of a stream one-fourth inch in diameter, to which extent the district court directed him to restrain the flow, is absolutely wasted, and so done without excuse. True, he pretended that the entire flow was essential to prevent clogging with sand or gravel, but the evidence shows conclusively that this was less likely with the smallest available exit. Again, he pretended to have in contemplation the elevation to his tenant's house, across the eighty acres, up some forty feet, of water for domestic use by the operation of a hydraulic ram. But the extent of his preparation therefor was the reading of a circular from some manufacturing company. There was no proper showing that the flow permitted would be inadequate for this purpose, and it conclusively appears that it had nothing to do with his insistency upon utterly wasting the water his neighbors so much needed.

But the presumption obtains that such waters are percolating waters, unless shown to be supplied by a stream of known and defined channel. Gould on Waters, sections 280, 281; *Hanson v. McCue*, 42 Cal. 303; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586; *Metcalf v. Nelson*, 8 S. D. 87; *Wheatley v. Baugh*, 25 Pa. 528; *Huber v. Merkel*, 117 Wis. 355. And it follows that the burden of proof is upon those asserting right to waters below the surface, on the ground that they flow in a defined and known channel, to establish the existence of such channel. *Black v. Ballymena Com'rs.*, 17 L. R. Ir. 459; *Huber v. Merkel*, *supra*.¹ There is nothing in the

¹ "It is to be observed that the mere existence of the channel is not enough; its location must be known or reasonably ascertainable. *Lybe's Appeal*, 106 Pa. St. 626; *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143, where the court concludes that it is clear, 'from the principles and reasoning of all the cases, that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below the ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location, and course.' And in *Black v. Ballymena Com'rs.*, 17 L. R. Ir. 459: 'So far the law on the subject is clear; but a difficulty appears still to exist as to the application of this rule by reason of the use of the word "known" in connection with the word "defined," and it does not seem to have been laid down as yet what the nature or extent of the knowledge is which must be proved to exist in order to constitute the riparian relations. It cannot mean that a channel should be visible throughout its course, which would be an impossibility, from the very fact of its being subterranean. In considering the question, the knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel, but must be knowledge by reasonable inference from existing and observed facts in the natural, or, rather, the pre-existing, condition of the sur-

record to overcome the presumption that the supply of the entire district is percolating water.

This being true, there is no doubt but defendant had the right to make such beneficial use of the water in the improvement of his land as he might choose. But it does not follow that he had the right to draw from this reservoir within the earth wherein nature had stored water in large quantities for beneficial purposes merely to waste or carry out a design to injure those having equal access to the same supply. Decisions to the effect that percolating waters are to be treated the same in law as the land in which found, and may be diverted, consumed, or cut off with impunity, without liability for interfering or destroying the supply, are numerous in this country and England—too numerous for citation; but see *Wheatley v. Baugh*, *supra*, *Mayor & Alderman, etc., v. Pickles*, A. C. (1895) 587, and *Frazier v. Brown*, 12 Ohio St. 294. In the last of these cases the principle underlying the right to such waters, and the reasons upon which it rests, were thus stated: "In the absence of express contract and of positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtering through the earth; and this mainly from considerations of public policy: (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible;² (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage, and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility." An examination of the authorities, however, indicates that they proceed upon the theory that the right thereto relates to the beneficial use of the land, and is connected with its enjoyment for the purposes of agriculture, mining, trade, improvement, and the like. This thought is emphasized by the dicta in many decisions to the effect that percolating waters may not be extracted from the earth

face of the ground. The onus of proof, of course, lies on the plaintiff claiming the right, and it lies upon him to show that without opening the ground by excavation, or having recourse to abstruse speculations of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream when it emerges into light comes from and has flowed through a defined subterranean channel." Surface indications of a stream are discussed in *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, where surface depressions extended on either side of a spring; in *Hale v. McLea*, 53 Cal. 578, where a line of bushes usually found nowhere except over water courses extended from a spring on adjoining land."

² But see *Ballard v. Tomlinson* and *Collins v. Chartier's Valley Gas Co.*, Note 1 to *Bradford v. Pickles*, *ante*, p. 1306.

to the injury of others merely to gratify malice. Thus, in the leading case of *Wheatley v. Baugh*, the court declared that "neither the civil law nor the common law permits a man to be deprived of a well or spring or stream of water for the mere gratification of malice. The reason is that water, like air, is of such a nature that no one can have an exclusive right in it. In the process of evaporation and condensation it is sent in refreshing showers all over the earth. In its descent into the ocean it necessarily passes from one to the other, and is intended for the benefit of all. The right of each is more or less dependent upon that of his neighbor."³ See, also, *Greenleaf v. Francis*, 18 Pick. 119, where it was held that an owner may dig a well in any part of his land, even though the water in his neighbor's well be diminished, but with this limitation, that in doing so he is not actuated by a malicious intent to deprive his neighbor of water without benefit to himself.⁴ The right being conceded, possibly the intent with which exercised would be immaterial. On this point the authorities are in conflict. See *Chesley v. King*, 74 Me. 164 (43 Am. Rep. 569); *Huber v. Merkel*, (Wis.) 94 N. W. Rep. 354.

The doctrine of correlative rights between landowners respecting the appropriation and use of percolating waters has been broadly applied in New Hampshire (*Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439), where the court declared that no good reason could be given why it should not be applicable in all cases where the rights of owners of adjoining lands to collect and use percolating waters are in apparent, though not real hostility. The courts of New York seem to have held that the owner of land may not sink wells on his own land from which, by the use of pumps of potential force and reach, he may drain the percolating waters from the premises of his neighbors to their injury, merely for the purpose of merchandising the water to consumers distant

³ The dictum is cited with approval in *Miller v. Black Rock etc. Co.*, 99 Va. 747 (1901), and in many of the later Pennsylvania cases, *Haldeman v. Bruckhart*, 45 Pa. 514 (1863); *Lybe's Appeal*, 106 Pa. St. 626 (1884); *Williams v. Ladew*, 161 Pa. St. 283 (1894); but in all of them it was, as in *Wheatley v. Baugh*, mere dictum, the acts done by the defendant being clearly appropriate to and intended for the improvement and development of his own property. But see *Hague v. Wheeler*, 157 Pa. St. 324 (1893).

⁴ The actual language used is "unless in so doing" (digging the well which diminishes the water in the plaintiff's well) "he is actuated by mere malicious intent to deprive his neighbor of water"; this is quoted with approval in *Roath v. Driscoll*, 20 Conn. 533 (1850); in *Chesley v. King*, 74 Maine 164 (1882), it is said that while the plaintiff's rights in the spring in question "were completely subject to the defendant's right to consult his own convenience and advantage in the digging of a well in his own land for the better supply of his own premises with water", they, "should not be ignored if it were true that the defendant did it for the mere, sole and malicious purpose" of cutting off the sources of the spring and injuring the plaintiff, and not for the improvement of his own estate; in *Wyandot Club Co. v. Sells*. See also, *Springfield Water-works Co. v. Jenkins*, 62 Mo. App. 74 (1895), p. 82; *Gagnon v. French Lick Springs Hotel Co.*, 163 Ind. 687 (1904), p. 696; and *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71 (1903).

from the land. *Forbell v. City of New York*, 164 N. Y. 522.⁵ In that case it was said: "In the absence of contract or enactment, whatever it is reasonable for the owner to do with his sub-surface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells, and take therefrom all the water that he needs, in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and others whose lands are thus clandestinely sapped, and their value impaired." The opinion seems to be grounded upon the notion that extracting the water by force constituted a trespass, and the court, apparently in recognizing a departure from previous decisions, added: "We more readily conclude to affirm because the immunity from liability which defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes. It

⁵ *Accord: Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 326 (1909), where emphasis is laid upon the powerful artificial means to monopolize the common source of supply and upon the fact that the use for which the water was appropriated, the extraction of carbonic acid for sale, was unconnected with the improvement and enjoyment of the land.

As to the use of artificial means to secure a share of subjacent water, oil or gas, greater than would flow naturally to the defendant's well, compare *Manufacturers' Gas & Co. v. Indiana Nat. Gas & Co.*, 155 Ind. 461 (1900), holding wrongful, with *Jones v. Forest Oil Co.*, 194 Pa. St. 379 (1900), holding lawful, the use of gas pumps of a sort customarily used and which by their low cost are within the reach of all well owners; and see *Richmond Nat. Gas Co. v. Enterprise Nat. Gas Co.*, 31 Ind. App. 222 (1903).

The appropriation of sub-surface water for a use not incidental to the development of the land which it underlies, is regarded as unlawful in *Katz v. Walkinshaw*, 141 Cal. 116 (1903), water pumped from the land piped to a distant reservoir and sold; *Cohen v. LaCanada Land & Co.*, 142 Cal. 437 (1904); *Gagnon v. French Lick Springs Hotel Co.*, 163 Ind. 687 (1904); *Hathorn v. Carbonic Gas Co.*, 194 N. Y. 326 (1909); see also, *Willis v. Perry*, 92 Iowa 297 (1894), city using water of a "subterranean stream" for the supply of its inhabitants; *contra, Huber v. Merkel*, 117 Wis. 355 (1903), and *Mecker v. East Orange*, 76 N. J. L. 435 (1908), p. 441, and see *Stillwater Water Co. v. Farmer*, 89 Minn. 58 (1903), *dubitante*, compare *Swindon Waterworks Co. v. Wilts and Berks Canal*, L. R. 7 Eng. & Irish App. Cas. 697 (1875), and *Scranton Gas & Water Co. v. Delaware, L. & W. R. Co.*, 240 Pa. St. 604 (1913), holding that riparian owners have as such no right to carry off water from the stream for sale or use outside their riparian land. The tendency of the later cases is to assimilate the rights of landowners to appropriate the sub-surface water or to divert it or obstruct its flow to adjoining land to the similar rights of riparian owners to use, detain or divert the water of a defined surface stream; see *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71 (1903), p. 78; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569 (1862), and see *Katz v. Walkinshaw*, 141 Cal. 116 (1903).

does wrong under the letter of the law, in defiance of its spirit." *Smith v. City of Brooklyn*, 14 App. Div. 340 (N. Y. 1897), is referred to approvingly. In that case, upon full consideration, the court declared that, while waters might be extracted from the depths for the reasonable use or improvement of the land, the law will not allow this to be done for some purpose unconnected with the use, improvement, or enjoyment of the land itself to the detriment of adjoining owners. See same case on appeal (160 N. Y. 367).

It is not necessary to go to this extent in order to sustain the decree in this case. The water from defendant's well, in excess of that allowed him by the court, fell to the earth, and immediately flowed from his land on that of a neighbor below. He proposed to draw the percolating waters, not to supply the people of a great city, but to waste without advantage to any one. In principle the case is like that of *Stillwater Water Co. v. Farmer*, (Minn.) 93 N. W. Rep. 907, and we are inclined to approve the doctrine therein announced. There the plaintiff supplied water for domestic purposes to the people of the city of Stillwater from a spring about which it had constructed a wall some six feet in diameter. This was within a few feet from the boundary line between the company's and Farmer's land. Near this line, and not more than ten feet from the center of the spring, Farmer excavated a trench, and placed in it a ten-inch tile drain connected with the city sewer. As a result percolating waters were drawn away from the spring, where they would naturally have gone, materially affecting the supply of water in the spring. Thereupon the company made a change in the outlet and in the mains to guard against such loss; whereupon Farmer began to lay his tile at a lower level, commencing at the sewer. A temporary injunction was granted, and in a well-considered opinion the court held that defendant might not even collect percolating waters merely to squander them to the detriment of his neighbor. The theory of the decision is that, while ownership of the soil extends to the center of the earth, it is somewhat restrained by the maxim, "*Sic utere tuo ut alienum non laedas.*" The court directs attention to the fact that in nearly every case where the right to collect or divert percolating waters has been upheld this has been for some beneficial purpose, and pertinently suggests that there is no good reason for not applying the doctrine of correlative rights in such a case, and that such application will not interfere with proper improvement of land, but tend to promote the general welfare of all citizens alike. The rule approved is thus stated: "Except for the benefit and improvement of his own property or for his own beneficial use, the owner of land has no right to drain, collect or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect, or divert such waters for the sole purpose of wasting them. Briefly stated, a landowner must not collect and wantonly waste percolating waters, which would otherwise be or have theretofore been appropriated by his neighbor for the general welfare of the people." A

contrary conclusion would permit defendant by allowing his well to flow at full capacity, not only to stop plaintiff's well, but every other well in the neighborhood, and this without the slightest benefit to himself. Indeed, this is precisely what he has threatened if interfered with. May one man thus waste the waters stored by nature for the community and wantonly deprive it of their use? Are the courts powerless to remedy such a wrong? The Supreme Court of Wisconsin seems to have so held. *Huber v. Merkel, supra*. A distinction between an injury to the quality of the neighbor's land, as in *Forbell v. City of New York*, and to the enjoyment of its use, is suggested, but this is not substantial. See, also, *Hague v. Wheeler*, 157 Pa. St. 324. Certainly no good reason can be found for allowing the owner of land to draw sub-surface water therefrom merely to waste, when this results in draining like water from his neighbor's land, to his detriment in its use and enjoyment. Water moves so readily from one place to another that any definite portion of it cannot be said to be the property of the owner of the soil until in some way reduced to control. The water flowing in defendant's well may have been from plaintiff's land or that of some other well-owner a moment previous. In this respect it differs from minerals beneath the surface, and is more like natural gas, which may not be allowed to escape by a landowner, when not made use of, to the detriment of his neighbors. *Ohio Oil Co. v. Indiana*, 150 Ind. 689; *Ohio Oil Co. v. Indiana*, 177 U. S. 190.

Possibly he may waste that on his own land, if he can do so without draining water from his neighbor's. But the source of the supply of percolating waters can seldom be determined, and this is one of the main reasons for permitting its free appropriation by the owner of the soil. A different rule would undoubtedly restrict the use and improvement of land. But the prevention of carrying the water from the land of the owner for the purposes of commerce or waste cannot retard the improvement of the land itself, and there is no just ground for tolerating such diversion when the direct result is to deprive the adjoining landowners by the incidental drainage of their land of a supply of water from the same natural reservoir. This would be extracting the subterranean water from the adjoining land to its injury, without any counter benefit to the land through which taken. This is a stronger case for the interference of a court of equity than *Forbell v. City of New York*. There the drainage rendered the adjoining land unfit for the growth of water cresses, which had formerly been raised upon it; here it destroyed the water supply essential for its customary use and enjoyment. There the drainage was to secure water to distribute to the inhabitants of a great city for profit; here the object was to turn it into a creek to flow unused in any way down to another's land below. The soundness of some of the reasoning of the *Forbell Case* may well be doubted. The exertion of the force there was in the removal of the subterranean waters in the city's land, and the only suction occasioned was by emptying a cavity into which the water naturally drained from the surrounding country. It is at least exceedingly

doubtful whether this constituted trespass. In a lesser degree this happens whenever the sinking of one well has the effect of drying up another. The doctrine of *Smith v. City of Brooklyn*, that the free use of such waters is limited to the improvement, use, and enjoyment of the land from which taken, and cannot be carried away for the purposes of commerce, to the injury of the premises of an adjoining owner, has the better reason for its support. But we need not go this far, even to sustain the decree of the district court, as in the case at bar the owner derived no benefit from the sale or use of the water. As said, the case is in principle like *Stillwater Water Co. v. Farmer, supra*. The doctrine there announced is in harmony with good morals. It interferes with no valuable right of the defendants. It shields from destruction property rights of great value belonging to the plaintiff and others. It goes no farther than to say that a landowner may not collect, drain, or divert waters percolating through the earth merely to carry from his own land for no useful purpose, when such action on his part will have the effect of materially injuring or destroying the well or spring of another, the waters of which are devoted to some beneficial use connected with the land where found. It applies in principle the doctrine of correlative rights to the control of sub-surface waters whenever the appropriation proposed is unconnected with the use, enjoyment, or improvement of the land from which taken.

Affirmed.*

DEEMER, J., concurs in result.

WYANDOT CLUB CO v. A. C. SELLS.

Court of Common Pleas, Ohio, 1895. 3 Ohio Nisi Prius Rep. 210.

PUGH, J. The question raised by the demurrer to the plaintiff's amended petition is identical with that which is raised by, and de-

*In the following cases the waste of water, gas or oil was held wrongful, *Stillwater Water Co. v. Farmer*, 89 Minn. 58 (1903); *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74 (1895); *Gagnon v. French Lick Springs Hotel Co.*, 163 Ind. 687 (1904); *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71 (1903); *contra, Huber v. Merkel*, 117 Wis. 355 (1903); *Hague v. Wheeler*, 157 Pa. St. 324 (1893); in all of these except the first the object was to force the plaintiff to buy up the defendant's land, to take him into his enterprise, or to rid the defendant of the plaintiff's competition.

In *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569 (1862), the flow of plaintiff's sub-surface water was impeded by the defendants' erection of a mill-dam and the consequent creation of a mill-pond, it was held that this interference was actionable unless caused by the reasonable use of the defendants' own land or privilege of erecting the dam, which was said to be a mixed question of law and fact; as to the factors to determine what is a reasonable use in New Hampshire, see the editor's article on "The Rule in *Rylands v. Fletcher*," 59 U. P. L. R. 4, and 59 Am. L. Reg. 373 (1911), pp. 382-383.

In *Huber v. Merkel*, 117 Wis. 355 (1903) (O. S.), a statute making the owner of an artesian well who permits the discharge of more water than is reasonably necessary for his use liable to the owner of another well whose flow is thereby diminished, was held unconstitutional as taking private property for private use without compensation; *contra, Ohio Oil Co. v. Indiana*, 177 U. S. 190 (1899); *Hague v. Wheeler*, 157 Pa. St. 324 (1893), *semble*.

cided on, the demurrer to the original petition, the decision having been rendered by Judge Badger.

The complaint is, that the defendant, by digging a hole within a few feet of the plaintiff's line, diverted the water from a definite and well known channel under the plaintiff's land, which flowed into a spring on its land, and abstracted, prevented and intercepted the flow of said water, which ought to have flowed into the plaintiffs' said spring. It is charged that the defendant was actuated by unmixed malice, and that his purpose was neither for the ornament or use of his own lands, which adjoined the plaintiffs' lands.

From such an examination and study as I was able to give the pertinent authorities,¹ I extract this rule, or exception to a rule:

If the proprietor of lands by digging a well, or making any other excavation, on his own lands, withdraws water from the spring on the neighboring proprietor's land, which has either percolated into it through the former's land, or flowed into it by well defined and well known subterranean streams or currents,—currents or streams coursing through and under the former's land, and if he does that, not for the purpose of accommodating or benefiting himself or others, but for the purpose of injuring the neighboring proprietor, or, in other words, if in doing it he is actuated by pure and unalloyed malice towards the latter, he is answerable for the damages sustained by his neighbor.

The amended petition shows facts, which bring the case within the application of the exception to the rule, which I have thus extracted from the authorities; and it is, therefore, not vulnerable to the demurrer.

BADOIT v. ANDRE.

Court of Lyons, 1856. Dalloz, 1856, Part 2, p. 199.

THE COURT;—On the question of responsibility; Considering that it has been proved that the mineral spring of Badoit and that of the Andre partnership, are only three meters apart from each other and are only at a few meters from the mineral spring belonging to the commune of Saint-Galmier;—Considering that the great proximity of the three springs must make it an admitted fact, agreeing with the facts found by the medical inspector of the springs, that they communicate with each other, either by infiltration or by arising from a common water shed or reservoir;—Considering that it results from the documentary evidence in the case: first that it was with the intention to injure Badoit that the Andre partners had pumps placed at the well of their spring; second that the use of this pump causes a diminution of two-thirds of the water of the Badoit spring and a lowering in the level of the water of the spring belonging to the commune; third that the Andre partners do not utilize in any way the surplus of mineral water obtained by the use of their pump or run it off into the Coise;—Considering that these

¹*Haldeman v. Bruckhart*, 45 Pa. 514; *Wheatley v. Baugh*, 25 Pa. 528 (1855); *Parker v. Boston & M. R. Co.*, 3 Cush. 107 (Mass. 1849); *Phelps v. Nowlen*, 72 N. Y. 39 (1878); *Chesley v. King*, 74 Maine 164 (1882).

facts convince the court that the hydraulic apparatus of the Andre partners has been a means employed solely for the purpose of withdrawing from the neighboring property by reason of the existing communication between the two springs, the greater part of the mineral water supplied to the Badoit spring and for the purpose of running it off into the river;—Considering that for that reason, the difficulty is one of an undertaking affecting the waters of neighboring land and that this act accomplished with no other purpose than to injure, has resulted in damage, of which, under the terms of article 1382, the others owe reparation;

Considering that the Andre partners cite ineffectually the maxim *nemo injuria facit qui jure suo utitur*, raising the defense that they may use their spring at will and that in this respect their right of property, under article 544 of the Civil Code, is absolute, and that this right includes even that of abusing the object of ownership;—Considering, in regard to the defense thus raised, that the right of the owner of necessity is limited by the obligation of allowing one's neighbor to enjoy also his property; that the power to abuse the object of one's ownership cannot serve to color the nature of an act, which, inspired exclusively by the desire to injure, assumes, by reason of a subterranean communication between the two pieces of land, the character of an undertaking affecting the neighboring land, affecting its very substance and destroying or lessening a natural advantage, which is in fact its principal value; that such an act rationally viewed in the light of the rule *malitiis non est indulgendum*, constitutes one of the cases of quasi-torts covered by article 1382.¹

¹ See note 6 to *Barger v. Barringer*, ante, p. 1293.

CHAPTER VI.

Acts Directed or Permitted by Legislative Enactment.

HAMMERSMITH, &c. RAILWAY CO. v. BRAND.

House of Lords, 1869. L. R. 1869-70, 4 Eng. & Ir. App. Cases, 171.

MR. JUSTICE BLACKBURN:

My Lords,—I have come to the conclusion that the plaintiffs below have no right to compensation for the vibration mentioned in the special case. I need not say that finding I stand alone amongst the Judges consulted by your Lordships, I give this opinion with diffidence. My reasons are as follows:—

I think it is agreed on all hands that if a person, not authorized by Act of Parliament so to do, erected a railway or any other private road on his land, and then worked it by running locomotives or trains, or any other species of carriages, upon it, so, that the vibration and noise were to such an extent as really to be annoying to a neighbor, that injury would be a nuisance, and that neighbor would have a fresh cause of action against the maintainer of the way every time that the way was so worked as to give rise to the nuisance, and he might, I apprehend, obtain an injunction to prevent the continuance of the nuisance. But if, instead of making and maintaining a private way of his own, the owner of the land dedicated it as a *public* highway, and the public brought traffic on it to such an extent that the noise and vibration seriously affected the neighbors, I apprehend they would be without remedy. The common law would leave them suffering a private hardship for the public benefit.

This distinction may have some bearing on the construction of the statutes (8 Vict. c. 18, and 8 Vict. c. 20), on the true meaning of which I think the present case depends.

And I think that it is agreed on all hands that if the Legislature authorizes the doing of an act (which if unauthorized would be a wrong and a cause of action) no action can be maintained for that act, on the plain ground that no Court can treat that as a wrong which the legislature has authorized, and consequently the person who has sustained a loss by the doing of that act is without remedy, unless in so far as the legislature has thought it proper to provide for compensation to him. He is, in fact, in the same position as the person supposed to have suffered from the noisy traffic on a new highway is at common law, and subject to the same hardship. He suffers a private loss for the public benefit.

Now the legislature has thought fit to authorize the defendants to make a railway, and by 8 Vict. c. 20, s. 86, "to use and employ locomotive engines and other moving power, and carriages and

wagons to be drawn or propelled thereby." And the first question is, whether this is such a legislative authorization of the use of such power as to render all such consequences as inevitably attend it no longer wrongful.

If this were a new matter I should think there was a great deal in what is thrown out by Baron Bramwell in his judgment in the Exchequer Chamber in this case; but the contrary was held in *Rex v. Pease*, 4 B. & Ad. 30, so long ago as 1832, and acted on in *Vaughan v. The Taff Vale Railway Company*, 5 H. & N. 679. And if your Lordships were to reverse those decisions the consequence would follow that any owner of a house or field so adjacent to a railway that the inevitable disturbance from the working of the line amounted to a nuisance might (at least where the railway has not been opened for twenty years) stop the working of the line. So large an amount has been invested in the belief that the trains might be run, even though some mischief to others was inevitable, that I think your Lordships will hold that even if the principle of *Rex v. Pease* was originally an error, it has long become *communis error*, and ought to be held to have made the law.

I come, therefore, to the conclusion that, but for the statutes, the plaintiffs would have had a right of action for the vibration arising from the working of the defendant's line, and that the statutes have taken away that right of action. The question then arises, whether the legislature has given the plaintiffs any compensation; and that must be a question depending on the construction of the statutes.¹

LORD CHELMSFORD:—

My Lords, this is a proceeding in error upon a judgment of the Court of Exchequer Chamber reversing a judgment of the Court of Queen's Bench in favour of the plaintiffs in error upon a special case.

The question raised for the opinion of the Court below was, whether the plaintiffs in the action, who are owners of a house adjacent to the *Hammersmith and City Railway*, were entitled to com-

¹ Blackburn, J., with whom agreed the majority of the House of Lords, was of the opinion that neither the Land Clauses Act nor the Railway Clauses Act, expressed an intention that compensation should be paid for such injuries, Willes, Lush, Bramwell, JJ., and Lord Cairns, diss., were of the contrary opinion. The majority held that the compensation in § 68 of the former Act for those whose lands have been "injuriously affected by the construction" of the railway, included only injuries resulting from the physical construction or erection of the works and did not cover injuries due to their operation after construction. In *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472 (1887), and *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541 (1888), a similar provision contained in the Pennsylvania Constitution, Sec. 8, Art. 16 of 1874, was given a similar construction, but see *Pennsylvania, S. V. R. Co. v. Walsh*, 124 Pa. St. 544 (1889), and *Willock v. Beaver Valley R. Co.*, 222 Pa. St. 590 (1909). On the other hand, similar constitutional provisions and statutes have been construed to give compensation for annoyances, etc., to adjacent owners, which, but for the legislative authority given for the railroad's operations, would be actionable nuisances, *Baker v. Boston Elev. R. Co.*, 183 Mass. 178 (1903), though such operations are not actionable as nuisances, *Chicago, M. & C. R. Co. v. Darke*, 148 Ill. 226 (1893).

pensation from the railway company for injury to their house from the vibration caused by the passage of trains over the line in the ordinary use of the railway, without negligence, whereby the house was depreciated in value to the extent, as found by a jury, of £272.

It must be borne in mind that this is not a case in which it was possible to claim compensation before the construction of the railway, nor, indeed, till after its workings had commenced, because till then it could not be known whether there would be any vibration injurious to the house occasioned by the passing of the trains. The simple question, therefore, is, whether the Legislature has provided compensation for any damage to land or houses not arising from negligence, but the inevitable consequence of the proper and ordinary use of the railway.

Assuming that before the passing of their Act the defendants would have been liable to an action for the injury caused to the plaintiffs' house, it is necessary for the plaintiffs in the first place to establish that the company's Act has taken away the remedy by action in order to open the way to their claim to compensation.

If the cases of *Rex v. Pease*, 4 B. & Ad. 30, and *Vaughan v. The Taff Vale Railway Company*, 5 H. & N. 679, were rightly decided, this question has been determined. It was established by those cases "that when the legislature has sanctioned the use of a locomotive engine there is no liability for any injury caused by using it so long as every precaution is taken consistent with its use." Mr. Baron Bramwell, in his answer to the question put by your Lordships to the Judges, adverting to the above cases, said, "With great respect I think those cases clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question." And he then reasoned in this manner, Law Rep. 2 Q. B. 232: "The 86th section of the 8 & 9 Vict. c. 20, which gives the company the right to be carriers on their own line, is preceded by a heading 'With respect to the carrying of passengers and goods upon the railway, and the tolls to be taken thereon;' there is not a word (said the learned Baron) in this heading as to the legalizing or allowing of nuisances. The company wanted no power to enable them to use a locomotive. A man may use a locomotive on his soil and freehold, and so may a corporation. They do not possess the power to use it so as to be a nuisance to their neighbors. If this were intended to be given, where are the words? The words are sufficient if meant to give *vires ultra* those of a company to make a railway, but insufficient if meant to authorize the doing of damage."

With great respect to the learned Baron we do not expect to find words in an Act of Parliament expressly authorizing an individual or a company to commit a nuisance or to do damage to a neighbor. The 86th section gives power to the company to use and employ locomotive engines, and if such locomotives cannot possibly be used without occasioning vibration and consequent injury to neighboring houses, upon the principle of law that "*Cuicunque aliquid quid cencedit, concedere videtur et id sine quo res ipsa esse*

non potuit," it must be taken that power is given to cause that vibration without liability to an action.² The right given to use the locomotive would otherwise be nugatory, as each time a train passed upon the line and shook the houses in the neighborhood actions might be brought by their owners, which would soon put a stop to the use of the railway. I therefore think, notwithstanding the respect to which every opinion of Mr. Baron Bramwell is entitled, that the cases of *Rex v. Pease*, 4 B. & Ad. 30, and *Vaughan v. The Taff Vale Railway Company*, 5 H. & N. 679, were rightly decided.

² *Accord*: *Decker v. Evansville & C. R. Co.*, 133 Ind. 493 (1892); *Dunsmore v. Central Iowa R. Co.*, 72 Iowa 182 (1887); *Atchison, T. & S. F. R. Co. v. Armstrong*, 71 Kans. 366 (1905); *Whitney v. Marine Cent. R. Co.*, 69 Maine 208 (1879); *Carroll v. Wisconsin Cent. R. Co.*, 40 Minn. 168 (1889); *Randle v. Pacific R. Co.*, 65 Mo. 325 (1877); *Parrot v. C. H. & D. R. Co.*, 10 Ohio St. 624 (1858); *Columbus & C. R. Co. v. Gardner*, 45 Ohio St. 309 (1887), and *Flichman v. Cleveland, C. & St. L. R. Co.*, 11 Ohio Dec. 543 (1893); *Thomason v. Seaboard Air Line R. Co.*, 142 N. Car. 318 (1906); *Beseman v. Pennsylvania R. Co.*, 50 N. J. L. 235 (1888); *Louisville & Nashville Terminal Co. v. Lellyett*, 114 Tenn. 368 (1903); *Fisher v. Seaboard Air Line*, 102 Va. 363 (1904); *Taylor v. Baltimore & O. R. Co.*, 33 W. Va. 39 (1889). *Contra*, *Baltimore Belt R. Co. v. Sattler*, 100 Md. 306 (1905), though here the smoke, etc., complained of was greatly increased by the defendants' disobedience of a municipal ordinance; *Fort Worth & C. R. Co. v. Pearce*, 75 Tex. 281 (1889), and *Trinity & B. V. R. Co. v. Jobe*, 126 S. W. 32 (Tex. Civ. App. 1910); and see *Willis v. Kentucky & I. Bridge Co.*, 104 Ky. 186 (1898), a railroad liable if, but only if, the plaintiff's premises are invaded by foreign substances such as smoke, soot, etc., compare *Cosby v. Owensboro etc. R. Co.*, 10 Bush 288 (Ky. 1834).

Accord: also the following cases in which the tracks were laid upon public highways, *Carson v. Central R. Co.*, 35 Cal. 325 (1868); *Chicago B. & C. R. Co. v. McGinnis*, 79 Ill. 269 (1875), but compare *Chicago M. & C. R. Co. v. Darke*, 148 Ill. 226 (1893); *Harrison v. New Orleans Pac. R. Co.*, 34 La. Ann. 462 (1882); *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62 (1875); *Struthers v. Dunkirk W. & C. R. Co.*, 87 Pa. 282 (1878); *C. & P. R. Co. v. Speer*, 56 Pa. 325 (1867), *contra*, *R. R. v. Pearce*, and *Trinity & B. V. R. Co. v. Jobe*, 126 S. W. 32 (Tex. Civ. App. 1910). In *Adams v. Chicago & C. R. Co.*, 39 Minn. 286 (1888), the abutting owner is held entitled to recover, because as such he owns the fee of the street to the center thereof, compare *R. R. v. Heisel*, 38 Mich. 62 (1875), and as to the distinction drawn between the laying and operation of surface roads and elevated railroads, compare *Fobes v. Rome W. & C. R. Co.*, 121 N. Y. 505 (1890) with *Story v. New York El. R. Co.*, 90 N. Y. 122 (1882); *Lahr v. Met. Elev. R. Co.*, 104 N. Y. 268 (1887); *Sperb v. Metropolitan Elev. R. Co.*, 137 N. Y. 155 (1893).

So where the defendant has legislative authority to lay gas pipes it is not liable for the escape of gas therefrom except on proof of negligence in their installation or maintenance, *Price v. So. Met. Gas Co.*, 65 L. J. Q. B. 126 (1895); see Jaggard, J. in *Gould v. Winona Gas Co.*, 100 Minn. 258 (1907); and one authorized to use electricity is not answerable for its escape, if its plant is equipped with those appliances which experience shows to be best to prevent such escape, *National Tel. Co. v. Baker*, L. R. 1893, 2 Ch. 186; *Cumberland Telephone & C. Co. v. United Electric R. Co.*, 42 Fed. 273 (1890); *Lake Shore & Mich. So. R. Co. v. Chicago L. S. & S. B. R. Co.*, 48 Ind. App. 584 (1911); *Railway Co. v. Tel. Assn.*, 48 Ohio St. 390 (1891).

Where, however, the operation, as the running of trains is on the particular occasion in violation of a statute, *e. g.*, a statute prohibiting Sunday traffic, a general legislative authority is no protection, *Georgia R. & C. Co. v. Maddox*, 116 Ga. 64 (1903), and see *Taylor v. Seaboard Air Line*, 145 N. Car. 400 (1907).

The plaintiffs' remedy by action being taken away, the question remains whether they are entitled to receive compensation from the company for the injury done to their house, a question which must be decided entirely by the provision of the Acts of Parliament relating to the subject.

LORD CAIRNS: On one part of the case I do entirely concur with them. It appears to me that the effect of the legislation on this subject is to take away any right of action on the part of the landowner against the railway company for damage that the landowner has sustained. It must be taken, I think from the statements in this case that the railway could not be used for the purpose for which it was intended without vibration. It is clear to demonstration that the intention of parliament was, that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequence would be that action after action would be maintainable against the railway company for the damage which the landowner sustained; and after some actions had been brought, and had succeeded, the Court of Chancery would interfere by injunction, and would prevent the railway being worked—which, of course, is a *reductio ad absurdum*, and would defeat the intention of the legislature. I have, therefore, no hesitation in arriving at the conclusion that no action would be maintainable against the railway company.³

The fact alone would certainly prejudice the mind to find, in the enactments upon the subject, compensation given, in some form or other, for the loss which, beyond all doubt, the landowner in such a case sustains. I do not mean to say that it would be safe to strain the words of an Act of Parliament on account of considerations of that kind, but if there be any doubt or ambiguity in the words, the consideration ought not to be overlooked that, beyond all doubt, the intention of legislation of this kind is that, in some shape or other, compensation should be made to those who sustain loss or harm by the operation of the parliamentary powers.

Judgment of Exchequer Chamber reversed.

MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT *v.* HILL.

House of Lords, 1881. L. R. 1880-81, 6 App. Cases, 193.

THE LORD CHANCELLOR (Lord Selborne):

My Lords, it must be assumed for the present purpose, that the small-pox hospital which the appellants have established at Hampstead, is, in its actual position, and independently of the particular way in which it is conducted, necessarily a nuisance to the

³ But see *Galveston, Harrisburg & San Antonio R. Co. v. De Groff*, 102 Tex. 433 (1909); *Raymond v. Transit Development Co.*, 65 Misc. 70 (N. Y. 1909), and compare *Chicago M. & C. R. Co. v. Darke*, 148 Ill. 226 (1893).

neighbors; and the injunction, which has been granted by the order appealed against "using the plot of land mentioned in the statement of claim, and buildings thereon, as a hospital for small-pox or any other infectious or contagious disorder, in such manner as to create a nuisance to the plaintiffs, or either of them." The appellants are therefore obliged, in order to succeed in this appeal, to prove that they have statutory authority to create a nuisance for the purpose of, and as incidental to, the maintenance of a small-pox hospital in this place.

The appellants say that such authority has been given to them by the 5th, 7th, and 15th sections of the *Metropolitan Poor Act*, 1867, and by orders of the Poor Law Board made pursuant thereto. As far as the orders of the Poor Law Board are concerned, they did undoubtedly direct the appellants to purchase the land in question at a specified price, and to build upon it an asylum for the reception of poor persons infected with or suffering from fever or small-pox; and I assume that the building, as erected and fitted up on that land, is in strict accordance with plans which the Poor Law Board has prescribed or approved.

The statute when examined is found to confer, in general terms, powers extending over a rather wide range of subjects. So far as relates to a hospital or asylum of this particular kind, there is nothing in it mandatory or imperative. Everything which it necessarily requires may be done, though no such hospital should ever, or anywhere, be established.¹

The result is: (1) That this act does not necessarily require anything to be done under it which might not be done without causing a nuisance; (2) That as to those things which may or may not be done under it, there is no evidence on the face of the

¹ The 5th section says that, "asylums to be supported and managed according to this Act, may be provided under this Act for reception or relief of the sick, insane or infirm, or other class or classes of the poor chargeable in unions or parishes in the Metropolis." The 6th section authorizes the formation of districts; and the 7th requires that, in each district so formed, "there shall be an asylum or asylums as the Poor Law Board from time to time by order direct;" leaving the class of poor persons, for whom any such asylum may be provided, entirely open. The 15th section enables the Poor Law Board from time to time, by order, to direct the managers "to purchase or hire, or to build, and (in either case) to fit up a building or buildings for the asylum, of such nature and size, and according to such plan, and in such manner, as the Poor Law Board think fit;" and the managers are required to carry such directions into execution. Subsequent clauses put the arrangement and conduct of any such asylum under the superintendence of the Poor Law Board. No compulsory power is given to acquire land, or any interest in land, for any asylum purposes. The Lands Clauses Acts are indeed incorporated by sec. 52; but sec. 53 expressly provides, that so much of those Acts as relates to the purchase of land, otherwise than by agreement, shall not be put in force except for certain purposes, not including these asylums. It appears incidentally from sec. 69 (which provides for the repayment of certain expenses therein specified out of the common poor fund), that asylums might be "specially provided under this Act for patients suffering from fever or smallpox;" but, except in that way, and from the fact that the general category of "sick" necessarily includes patients suffering from any kind of disease.

Act that the legislature supposed it to be impossible for any of them to be done (if they were done at all) somewhere and under some circumstances, without creating a nuisance; and (3) That the legislature has manifested no intention that any of these optional powers, as to asylums, should be exercised at the expense of, or so as to interfere with, any man's private rights. The only sense in which the legislature can be properly said to have authorized these things to be done, is that it has enabled the Poor Law Board to order, and the managers to do them, if, and when, and where, they can obtain by free bargain and contract the means of doing so.

If the legislature has authorized some compulsory interference with private rights of property, within local limits which it might have thought fit to define, for the purpose of establishing this asylum to be used for the reception of patients suffering from small-pox or other infectious disorders, and provided for compensation to those who might be thereby injuriously affected (in such cases and under such conditions as it might have prescribed) the present case might have been like *Rex v. Pease*, 4 B. & Ad. 30, and the *Hammersmith Railway Company v. Brand*, Law Rep. 4 H. L. 171. No person outside the statutory line of compensation, even if the use of the asylum in the manner authorized by the statute had been productive of serious damage to him, could then have obtained any relief or remedy, upon the footing that what the statute authorized was a legal nuisance to himself, or, in itself an actionable wrong. But the case is different, when (as here) no interference at all with any private rights is authorized, and no place, or limit of space, is defined within which the establishment of such an asylum is made lawful. Neither the Poor Law Board nor the managers could for this purpose have taken a single foot of ground, or have interfered with any, the most insignificant, easement against the will of the plaintiffs, or of any other person to whom such land or easement might belong. No line is here drawn by the legislature between interests which are, and interests which are not, proper subjects for compensation. Under these circumstances, I am clearly of opinion that the Poor Law Board and the managers had no statutory authority to do anything which might be a nuisance to the plaintiffs without their consent.

I therefore move your Lordships to affirm the judgment of the Court below, and dismiss this appeal.

LORD BLACKBURN:

If it be the fact that such an asylum must be a nuisance, unless on a site so extensive as to keep all habitations at a considerable distance, it may be that such a site cannot be obtained at all in the neighborhood of the metropolis, or only at a cost so enormous to make it practically impossible. If that is the case it might be for the consideration of the legislature whether the certain danger of infection, from leaving the infectious sick paupers where they fell ill, exceeded that which would arise from a well-regulated hospital erected in another place, to such an extent that it was for the pub-

lic benefit that this latter risk should be run, and whether the rights of owners of property there should stand in the way of such a public benefit, or should be made to give way, with or without compensation.

It is clear that the burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears. There are no express words in this Act, and I think the weight of argument is rather against than in favor of such an implication. There is no power given to take land for a site otherwise than by agreement. For, though the Lands Clauses Acts are incorporated by sect. 52, yet by sect. 53 so much of the Lands Clauses Acts as relates to the purchase of lands otherwise than by agreement, shall not be put in force except for the purpose of enlarging an existing workhouse.

The asylum under this Act must therefore be either made by (under sect. 18) converting a workhouse into an asylum, which is not the present case, or by erecting one on land purchased or hired by agreement. In *Cloves v. Staffordshire Potteries Waterworks Company*, Law Rep. 8 Ch. Ap. 125, Lord Justice Mellish says (p. 139): "if no compulsory powers were given for the purpose of purchasing lands upon which the works were to be built, it certainly seems extraordinary that compulsory powers should be given to take away the rights of other persons, who have rights in the nature of easements over the lands so purchased."

LORD WATSON:—

The judgment of this House in *The Hammersmith Railway Company v. Brand*, Law Rep. 4 H. L. 171, determines that where Parliament has given express powers to construct certain buildings or works according to plans and specifications, upon a particular site, and for a specific purpose, the use of these works or buildings, in the manner contemplated and sanctioned by the Act, cannot, except in so far as negligent, be restrained by injunction, although such use may constitute a nuisance at common law; and that no compensation is due in respect of injury to private rights, unless the Act provides for such compensation being made. Accordingly the respondents did not dispute that if the appellants or the Local Government Board had been, by the *Metropolitan Poor Act*, 1867, expressly empowered to build the identical hospital which they have erected at *Hampstead*, upon the very site which it now occupies, and that with a view to its being used for the treatment of patients suffering from small-pox, the respondents would not be entitled to the judgment which they have obtained. The appellants do not assert that express power or authority to that effect has been given by the Act either to themselves or to the Board; but they contend that, having regard to the nature of the public duties laid upon them, and the necessities of the case, it must, on a fair construction of the Act, be held that the legislature did intend them to exercise, such power and authority under the direction and control of the Poor Law Board.

I see no reason to doubt that, wherever it can be shown to be matter of plain and necessary implication from the language of a statute, that the legislature did intend to confer the specific powers above referred to, the result in law will be precisely the same as if these powers had been given in express terms. And I am disposed to hold that if the legislature, without specifying either plan or site, were to prescribe by statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons laboring under infectious disease, no injunction could issue against the use of a hospital established in pursuance of the Act, provided that it were either apparent or proved to the satisfaction of the Court that the directions of the Act could not be complied with at all, without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the legislature at the time when the Act was passed.

On the other hand, I do not think that the legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the legislature, lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights. If the order of the legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to show that the legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose. * * * There is no question as to the *bona fides* both of the Board and of the managers. It is clear that they acted in the honest belief that all they did was for the benefit of the community, and within their statutory powers. But that will not avail if the Act does not empower either of them, or both, in conjunction, to erect an asylum to the nuisance of neighboring proprietors. These powers appear to me to be from first to last permissive and not imperative.

Whether they shall be exercised at all, and, if so, to what extent and effect their exercise shall be carried, is left to the discretion of the Local Government Board. No doubt, the language of sect. 7 is imperative, and that is a circumstance upon which the appellants were fairly entitled to argue in support of their contention. But it is, in my opinion, a conclusive answer to their argument that, in the first place, the Board is not bound to form a district, and in the second place, if they do see fit to form a district in terms of sect. 6, they are under no statutory compulsion to establish an asylum for small-pox patients by reason of the provisions of sect. 7, but have ample means of satisfying these provisions by that erection and the use of an asylum or of asylums which do not constitute a nuisance to anybody. So far as regards a small-pox hospital, the discretion committed to the Board is not limited to determining on what site, of what size, and according to what plan it shall be built, but involves the duty of considering and determining whether it shall be built at all.²

Gaynor, J., in Sadlier v. New York, (1903) 81 N. Y. S. 308. The law in England undoubtedly is that if Parliament authorize the actual taking of private property, or the construction and use by an individual or corporation of anything which is necessarily a private nuisance, or injures the property of individuals, and provides no compensation therefor, the courts can give no redress for the injury. The question in each case is whether that is the intention of Parliament, and if it be the courts are bound to abide by it. But while Parliament has the power to do this, the courts of England refuse to construe an act of Parliament as doing or meaning so unjust a thing unless the act be so specific and precise that it cannot be otherwise construed. *Managers v. Hill*, 6 App. Cases, 193.

But this is so in England only because Parliament is under no limitation or restraint. All lawyers and other students of constitutional history know that Parliament is not subject to the constitutional restraints in respect of private rights which legislative bodies in this country are under. It is omnipotent, as the expression is. Bryce's *Am. Com.* vol. 1, p. 32; Lecky's *Dem. & Lib.* vol. 1, pp. 8, 53. The restraints upon government contained in Magna Charta were extorted from the crown, and were and are to this day in England upon the crown or executive branch of government only. They were never restraints upon legislative power until made such in this country by our fundamental instruments of government. Those who made them such may not have been aware at the time that they were doing so, only having in mind, it may be, the sense in which such restraints had been theretofore understood; at all events they were evidently unaware of their far-reaching effects as exemplified by modern constitutional development.

In this country, the more plain and explicit the Legislature might be in authorizing the taking of private property, or a "direct" injury thereto, by a nuisance per se, or any trespass, the more plain it would make manifest that it had exceeded its constitutional powers. *Kobbe v. Village of New Brighton*,

² *Accord: Canadian Pac. R. Co. v. Parke*, L. R. 1899, A. C. 535. See *Adler v. Pruett*, 169 Ala. 213 (1910).

20 Misc. Rep. 477, 45 N. Y. S. 777. The full extent of legislative power to legalize and shield a nuisance is to exempt it from public prosecution. *Bohan v. Port Jervis G. L. Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711.¹

KING v. VICKSBURG RAILWAY & LIGHT CO.

Supreme Court of Mississippi, 1906. 88 Miss. 456.

CAMPBELL, Special J. The appellant is the owner of a piece of land in Vicksburg, on the north side of Pine street, on which are five dwelling houses, one occupied by her and the others by tenants. The appellee owns and operates a plant on its land on south side of that street for generating electrical power to furnish light for the city and its inhabitants and a street railway system, under a franchise granted by the city, with which it has a contract to furnish lights. The appellee claimed that it is exempt from liability for any damage, because it is operating under public authority conferring the right to do what it does. The court instructed the jury to find for the defendant, refusing all instructions asked by the plaintiff.

The evidence shows that the property of the plaintiff was damaged by physical invasion of deleterious agents produced by the plant of the defendant and the Alabama & Vicksburg Railway, and it should have been left to the jury to say from which and to what extent. Considered as if between two private owners of the two properties, without reference to the public franchise, the right of the plaintiff to recover damages to the extent that it may be shown that they proceed from a physical invasion of her property by hurtful agents proceeding from the plant of the defendant is clear. No owner of property may set in motion agencies which physically invade the home of another without liability for the damage done. Surely no citation of authority for this proposition can be necessary. An elaborate discussion of the subject is contained in a note under the first case in volume 1, L. R. A. (new series). Public authority may confer the right to operate a public work, and thus make it lawful, but cannot confer a right to take or damage private property without compensating the owner for its value as taken or damaged—that is, diminished in its market value as property—by some physical invasion of it or by affecting some right of the owner in relation to it. Were an act passed by the legislature for the exercise of the right of eminent domain declaring that no liability should arise for noise, smoke, soot, cinders, vibration, and the like, whatever their hurtful effect on the property of others might be, it would be void, because the elements or factors of damage to property depend upon facts, and are to be ascertained by evidence in judicial proceedings.

¹ See *Eaton v. Boston C. & C. R. Co.*, 51 N. H. 504 (1872), especially pp. 516-517.

The question of what constitutes a "taking" or "injury" or "destruction" within the varying terms of the various constitutional prohibitions and the distinction between direct and consequential damage often held to be controlling belongs to the Constitutional law rather than to the law of Torts. It would seem that the distinction often drawn between acts which merely subject the occupiers of adjacent lands to slight inconvenience and annoyance and those which seriously disturb their enjoyment. (See *Sawyer v. Davis*, *post*, and cases cited in note 1 thereto.)

Constitution 1890, sec. 17,¹ makes the right of the owner of private property superior to that of the public, reversing the former rule that the individual might be made to suffer loss for the public. He still may be compelled to part with his property for public use, but only on full payment for it or any right in relation to it. The decisions of this court since the constitution of 1890 give full effect to the just rule established by its seventeenth section, by maintaining the right of the owner to be fully compensated for any loss of value sustained from any physical injury to his property or disturbance of any right in relation to it, whereby its market value is diminished.

It is worthy of observation that the instruction prescribed to be given the jury in eminent domain proceedings is that "the defendant is entitled to due compensation, not only for the value of the property to be actually taken, * * * but also for damages, if any, which may result to him as a consequence of the taking." Code 1892, § 1690; Code 1906, § 1865. It is true that the language of section 17 of the constitution was intended for formal condemnation proceedings, wherein it provides for compensation to be first made in a manner to be prescribed by law; but it is equally protective of the owner of private property, when no condemnation is had and his property is taken or damaged by public use. Due compensation is what ought to be made—that is, what will make the owner whole pecuniarily for appropriating or injuring his property by any invasion of it cognizable by the senses, or by interference with some right in relation to property whereby its market value is lessened as the direct result of the public use.

DOLAN v. CHICAGO, M. &c. R. CO.

Supreme Court of Wisconsin, 1903. 118 Wis. 362.

WINSLOW, J. This is an action at law, under sec. 3180, Stats. 1898, to recover damages for, and secure the abatement of, a nuisance. The alleged nuisance consists of stock-yards, maintained by the defendant upon its depot grounds at the village of Cashton, from which offensive and injurious odors and noises are said to proceed to the great discomfort of the plaintiff and his family. The evidence was entirely sufficient to sustain the findings of the jury, and the questions presented are purely questions of law.

The defendant is a railway company duly chartered and operating a railroad. It is bound by positive requirement of law to receive and transport freight tendered to it for shipment, and provide suitable facilities for receiving and handling the same at any of its stations. Stats. 1898, sec. 1798. It is also required to maintain a station at every village through which it passes which has a post office and a population of 200 people or more. *Id.* sec. 1801. It must receive for carriage all live stock offered to it from February

¹"Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such, determined without regard to legislative assertion that the use is public."

1st to September 30th, inclusive, and properly transport the same over its road. Id. sec. 1799a. In order to discharge the statutory duty of receiving and transporting live stock, it must have facilities for the purpose at its stations, or in some convenient place within a reasonable distance. Inasmuch as it cannot have a train ready at all times to immediately receive and transport the stock offered, it must necessarily have yards or inclosures in which the animals may be kept until they can be taken away in the regular course of the operation of the road. That offensive smells and unpleasant noises will inevitably come from such yards, when in use, is matter of common knowledge. The skill of man has not yet devised means, within the bounds of reasonable expense and diligence, by which these disagreeable results can be wholly avoided. It must follow that, if a railway company exercises reasonable and proper diligence and care in the location of its yards and in its management, it has performed its whole duty. Impossibilities cannot be required. Duties cannot be imposed, and punishments inflicted, simply because the duties have been performed. If injury results to others, it must in such case be *damnum absque injuria*. The same rule must apply which applies to noise and smoke and steam resulting from the operation of the railroad. If these annoyances result simply from the necessary and proper operation of the road, they must be borne. If the company use the best and most improved devices to prevent injury to others, it is protected by its franchises. If it is negligent in this regard, it must respond in damages, if a nuisance is thereby created. 2 Wood, Nuisances (3d ed.) § 755. So, in the case of stockyards, the railway company must use all reasonable diligence in the location of its yards, to avoid injury to others, and must manage them with approved methods, using all reasonable skill to prevent their becoming a nuisance. It cannot unnecessarily or unreasonably locate its yards in close proximity to dwellings or business houses, to their injury, without incurring liability. It must, doubtless, in order to perform its duty, place the yards in a reasonably practicable and convenient location in the vicinity of the station, for the reception and shipping of cattle, but it must at the same time place them where they will do the least possible injury to others. If these requirements be fulfilled, and if the yards be operated without negligence, and with that skill and diligence to avoid noise and noxious smells therefrom which the importance of the duty demands, there can be no liability, even though injury may result to others. Such injury, like many others, is simply one of the penalties we have to pay for the conveniences of modern methods of transportation.

Much reliance was placed by the plaintiff upon *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, and *Anderson v. C., M. & St. P. R. Co.*, 85 Minn. 337, 88 N. W. 1001. In the first of these cases a railroad company had constructed a roundhouse and machine shop next to a church, and the noise seriously disturbed the religious exercises. This was held to be an actionable nuisance, but the fact plainly appeared in the case

that the location was unreasonable, and that there were many other places in the city where the shop could have been placed, and answer all railroad purposes fully as well. These being the facts, it was held that the shop so situated was a nuisance, and that, whatever rights were conferred on the railroad company by its charter, they were subject to the qualification that their works should not be so placed as by their use to *unreasonably* interfere with and disturb the comforts of others. The case goes no further, and, when rightly understood, it does not antagonize the propositions already laid down in this opinion. The second case cited is a stockyards case, and contains language tending to justify plaintiff's position here. In that case, however, the evidence established the fact that the yards were kept in an absolutely filthy condition, to the extent that dead animals were allowed to remain in them and become putrid. In view of these facts, the opinion must be read. The court said, in substance, that defendant's claim was that it had a right to select any place on its right of way for the reception and shipment of stock, but that it could not be conceded that a railroad company could rightfully create noxious conditions on its own property so near the private dwellings of others as *unnecessarily* to interfere with the health of the inmates. Here the element of necessity, which must mean reasonable necessity in the proper conduct of its business, is plainly recognized. This is not the case of a manufacturing company, which may purchase property and locate its works wherever it may choose. The stockyards must be adjacent to the railroad line, the location of which is fixed, and they must be at or in convenient proximity to a station. It will not do to say that the company must go out into unsettled districts in the country for its stockyards, for that is to say that, as soon as people begin to reside in the vicinity, the yards must be again removed to some more secluded spot, and so on *ad infinitum*.¹

COGSWELL v. NEW YORK N. H. & H. R. CO.

Court of Appeals of New York, 1886. 103 N. Y. 10.

Appeal from judgment of the General Term of the Superior Court, of the city of New York, entered upon an order made December 12, 1881, which affirmed a judgment in favor of defendant,

¹ *Accord: Cleveland & Pittsburgh R. Co. v. Speer*, 56 Pa. 325 (1867), power to construct railroad in the most direct and least expensive route held to authorize the construction of switches and side-tracks and to give to the company wide discretion to determine where they should be constructed, compare *London Brighton & South Coast R. Co. v. Truman*, L. R. 11 A. C. 45 (1885), reversing the decision of the Court of Appeal, L. R., 25 Ch. Div. 423; *Beidelman v. Atlantic City R. Co.*, 19 Atl. 731 (N. J. Ch. 1890), power to condemn land for terminal held to authorize its location near residences; *Georgia R. & C. Co. v. Maddox*, 116 Ga. 64 (1902); *Taylor v. Seaboard Air Line*, 145 N. Car. 400 (1907). In *Romer v. St. Paul City R. Co.*, 75 Minn. 211 (1899), a distinction is drawn between the shops, round-houses, etc., of steam railroads as to which it is intimated that there is a wide choice of prac-

entered upon a decision of the court on trial without a jury. (Reported below, 16 J. & S. 31.)

This action was brought to recover damages to plaintiff's premises in the city of New York, alleged to have been caused by the use on the part of defendant of an engine-house on adjoining premises, and to restrain such use.

The material facts are stated in the opinion.

ANDREWS, J. We are relieved by the findings of the trial judge, from any question as to the sufficiency of the evidence to establish that the engine-house as used by the defendant, constitutes, under the general rule of law, a private nuisance to the property of the plaintiff. It is scarcely necessary to cite authorities to show that the engine-house as used, was, within every definition a nuisance, for which, as between individuals, an action would lie for damages, and for which a court of equity would afford a remedy by injunction. The court placed its judgment denying relief, upon the ground that the defendant was a railroad corporation, authorized by law to acquire real estate for an engine-house; that an engine-house at the point where this engine-house was erected was necessary for the operation of its road; and that in the construction and use of the engine-house and coal-bins, it had exercised all practicable care. The finding of law from these premises, was that "whatever damage resulted to the plaintiff or his property, by reason of the defendant's use and occupation of its engine-house and coal-bins, is *damnum absque injuria*."

It is manifest that if this judgment can stand a most serious injury is inflicted by the defendants upon the plaintiff for which she has no redress. Her premises are subjected to a burden in the nature of a servitude in favor of the defendant, which seriously impairs the value and enjoyment of her property. The principle upon which the court below proceeded, was that what the legislature has authorized the defendant to do, can neither be a public nor private wrong; in other words the legislature has authorized the maintenance of this nuisance by the defendant and the plaintiff must bear the consequences. The court below, in denying any relief to the plaintiff, of course assumed that the legislative authority and the act of the defendant thereunder resulting in flooding the plaintiff's premises with soot, smoke and noxious gases was not a taking of the plaintiff's property within the constitution. We place our judgment in this case on the ground that the legislature has not authorized the wrong of which the plaintiff complains, and it is, therefore, unnecessary to determine whether the legislature could have authorized it consistently with the principles of the constitution for the security of private rights, without providing for compensation.

We shall pass without examination the question whether the authority given to the defendant to purchase land for an engine-

licable location and a car-barn of a street railway, which it said must be located in a residential district, and holding that, in the choice of the location of such a barn, the rights of the railway and the public served by it must be consulted as well as those of adjacent property owners.

house is implied in the power conferred in the sixth section of the act of 1848, to enter into an agreement with the Harlem railroad for the use of the tracks of that road, and to run its cars thereon to the city of New York. For the purpose of this case we shall assume that the general power conferred included the latter power as incident. It is no doubt a settled principle of the law that many things may be done by the owner of land, causing consequential damages to his neighbor, for which the law affords no remedy. The cases embraced within this rule are those either where what was done was in the lawful and reasonable use by an owner of land of his own property, or where the damages suffered, although by possibility attributable to the wrongful act of another, were too remote therefrom to justify the court in treating the one as the sequence of the other. The case before us belongs to neither of these categories. The defendant's engine-house, as maintained, was a palpable nuisance, causing special injury to the plaintiff, for which, by the general rule of the common law, she has a right of action. The defendant, however, does not rely for its justification upon the ordinary rule governing the rights of adjoining proprietors, but, as we have said, rests upon the claim that the legislature has authorized the acts of which the plaintiff complains, and has, therefore, made that lawful which otherwise might be unlawful, and has taken away any remedy which the plaintiff otherwise might have had. It is undoubtedly true that there are cases in which the legislature in the public interest may authorize and legalize the doing of acts resulting in consequential injury to private property, without providing compensation, and as to which the legislative sanction may be pleaded in bar of any claim for indemnity. Indeed such is the transcendent power of parliament, that it is the settled doctrine of the English law that no court can treat that as a public or private wrong which parliament has authorized, and consequently, as stated by Blackburn, J., in *Hammersmith, etc., Railway Co. v. Brand* (4 H. L. Cas. (Eng. & Ir. App.) 171), "the person who has sustained a loss by the doing of that act is without remedy, unless in so far as the legislature has thought it proper to provide for compensation." The legislative power in this country is subject to restrictions, but nevertheless private property is frequently subjected to injury from the execution of public powers conferred by statute, for which there is no redress. The case of consequential injuries resulting from street improvements authorized by the legislature is a familiar example.¹ The case of *Bellinger v. New York Central Railroad Company*² is perhaps the strongest case to be found in our reports, of the application of the doctrine that a statutory authority justifies acts which otherwise would give a right of action. But it will be noticed that it was a case where the line of the road was fixed by the charter. It was necessary in constructing the road on that line, to cross the creek on a bridge, and the low lands upon an embankment. The flooding of the plaintiff's premises was an unusual occurrence, and

¹ Citing *Radcliff v. Mayor*, 4 N. Y. 195.

² 23 N. Y. 42.

the evidence was very slight that it was caused by the structures of the defendant. It was under these circumstances that the court reached the conclusion that the damages suffered by the plaintiff were not recoverable in the absence of negligence on the part of the defendant in the construction of the road.

But the statutory sanction which will justify an injury to private property, must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury.³ This is but an application of the reasonable rule that statutes in derogation of private rights, or which may result in imposing burdens upon private property, must be strictly construed. For it cannot be presumed, from a general grant of authority, that the legislature intended to authorize acts to the injury of third persons, where no compensation is provided, except upon condition of obtaining their consent. This construction of statutory powers, applies with peculiar force to grants of corporate powers to private corporations, which are set up as a justification of corporate acts to the detriment of private property.⁴

The authority conferred upon the defendant by the sixth section of the act of 1848, to run its trains over the Harlem railroad, was not, however broadly construed, a legislative sanction to commit a nuisance upon private property. The authority expressly given was not absolute, but conditional upon obtaining the consent of the Harlem railroad. It could not be known by the legislature that the building of an engine-house would necessarily interfere with private rights. However necessary it may be for the defendant that its engine-house should be located where it is, this constitutes no justification for the injury suffered by the plaintiff, nor is it any answer to the action that it exercises all practicable care in its management. It may have the right, which it claims, to acquire land by purchase for the accommodation of its business, but it must secure such a location as will enable it to conduct its operations without violating the just rights of others. Public policy indeed requires that in adjusting the mutual relations between railroad companies and individuals, courts should not stand upon the assertion of extreme rights on either side, but in this case facts leave no room for doubt that the plaintiff has suffered a substantial and unauthorized injury.

The case of *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church* (108 U. S. 317) fully supports the conclusion we have reached in this case, and the able opinion of Mr. Justice Field in

³ See *Schopp v. St. Louis*, 117 Mo. 131 (1893), and *Sultan v. Parker-Washington Co.*, 117 Mo. App. 636 (1906).

⁴ In *Beidelman v. Atlantic City R. Co.*, 19 Atl. 731 (N. J. Ch. 1890), the fact that the defendant had been given the power to condemn land for a terminal was regarded as important.

that case vindicates the right of private property to protection against substantial invasions under color of corporate franchises.

The judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.*

* In *Choctaw O. & G. R. Co. v. Drew*, 130 Pac. 1149 (Okla. 1913), *Louisville & Nashville Terminal Co. v. Lellyett*, 114 Tenn. 389 (1905), and *Missouri K. & C. R. Co. v. Mott*, 98 Tex. 91 (1904), it is held that railroads in locating their necessary terminals, engine-houses, shops, etc., do so at their peril; in *Terrell v. C. & O. R. Co.*, 110 Va. 340 (1909), it is held that while a railroad in carrying passengers and freight is performing public functions, it acts in a private capacity in providing means for such carriage, as by the erection and operation of shops, engine-houses and power plants.

In the following cases the location was manifestly improper or the defendant failed to show that his plant could not have been located at some point where it would have done less or no harm to adjacent owners, *Chicago G. & C. R. Co. v. First M. E. Church*, 102 Fed. 85 (C. C. A. 8th Circ. 1900), and *Baltimore & Ohio R. Co. v. Fifth Baptist Church*, in the one case, a water tank for the supply of engines, in the other an engine-house and shop located in the residential district in the immediate vicinity of complainant church; *Shively v. Cedar Rapids, Iowa Falls & Northwestern R. Co.*, 74 Iowa 169 (1887), cattle pens and yards; *Churchill v. Burlington Water Co.*, 194 Iowa 89 (1895), water works located at a point not yet approved by local councils; *Sultan v. Parker-Washington Co.*, 117 Mo. App. 636 (1906), contract to lay asphalt for city held to give no license to operate a movable plant at the point where the work was being done; *Towaliga Falls Power Co. v. Sims*, 6 Ga. App. 749 (1909), power company furnishing electric power to municipalities held not entitled to erect dams where they collect stagnant water, which serve as a breeding place for mosquitoes. So the defendant must show that the act which causes injury or annoyance to others is itself expressly authorized or is necessary to carry out the operations expressly authorized, it is not enough that it is a convenient or economical means for so doing, *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18 (1890), gas company, for the sake of economy, adopted a new process which greatly increased the offensive character of its operations; *Rosenheimer v. Standard Gaslight Co.*, 36 App. Div. 1 (N. Y. 1898); *Kobbe v. New Brighton*, 23 App. Div. 243 (1897); *Illinois Central R. Co. v. Grabill*, 50 Ill. 241 (1869), cattle pen kept in unnecessarily filthy condition; *Wylie v. Elwood*, 134 Ill. 281 (1890), held to be a question for the jury whether the method of unloading coal adopted by the defendant was proper; *McAndrews v. Collierd*, 42 N. J. L. 189 (1880), explosives, necessary to do the blasting required to construct an authorized tunnel, stored near the scene of the operation but within city limits; and compare *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316 (1886), and *Pennsylvania R. Co. v. Thompson*, 45 N. J. Eq. 870 (1889), with *Beideman v. Atlantic City R. Co.*, 19 Atl. 731 (N. J. Ch. 1890); see also *G. B. & L. R. Co. v. Eagles*, 9 Colo. 544 (1886); *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 146 (1868), committee authorized to maintain large lunatic asylum held not justified in discharging the resulting sewage upon adjoining lands; *West v. Bristol Tramways Co.*, L. R. 1908, 2 K. B. 14, ante, p. 593, n. 1; *Ogston v. Aberdeen District Tramways*, L. R. 1897, A. C. 111; *Alliance & Gas Co. v. Dublin*, 1 Irish R. 492 (1901).

This applies also to public works executed under legislative authority by a municipality, *Morton v. New York*, 140 N. Y. 207 (1893), *Winona v. Botzet*, 169 Fed. 321 (1909); but see *Miller v. Webster City*, 94 Iowa 162 (1895). Where the power of eminent domain is given to those executing the authority, it is suggested in *Towaliga Falls Cq. v. Sims*, and *Morton v. Mayor*, 140 N. Y. 207 (1893), that if the structure or its operation is one necessarily injurious to adjacent property, destructive of the reasonable comfort or health of its occupants, all the lands likely to be injuriously affected should be acquired by condemnation.

POTTSTOWN GAS COMPANY v. MURPHY.

Supreme Court of Pennsylvania, 1861. 39 Pa. 257.

LOWRIE, C. J. (After approving the instructions of the court, under which the jury had found that the stench from the defendants' gas works and the percolation of offensive matter from them to the plaintiff's well were a nuisance.) But the defendants think that as a corporation, authorized by statute to carry on this business, and to purchase in fee simple such real estate as may be necessary for it, they are not answerable for such consequential damages as are complained of here. We cannot adopt this view. No such exemption is involved in the fact of incorporation, nor in the privilege of buying land. The principle they invoke applies only where an incorporation, clothed with a portion of the state's right of eminent domain, takes private property for public use on making compensation, and where such damages are not part of the compensation required. Judgment affirmed.¹

Strong, J., dissented.

SAWYER v. DAVIS.

Supreme Judicial Court of Massachusetts, 1884. 136 Mass. 239.

C. ALLEN, J. Nothing is better established than the power of the legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed, and business carried on, with a view to the good order and benefit of the community, even although they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. *Bancroft v. Cambridge*, 126 Mass. 438, 441. In most instances, the illustrations of the proper exercise of this power are found in rules and regulations restraining the use of property by the owner, in such a manner as would cause disturbance and injury to others. But the privilege of continuing in the passive enjoyment of one's own property, in the same manner as formerly, is subject to a like limitation; and with the increase of population in a neighborhood, and the advance and development of business, the quiet and seclusion and customary enjoyment of homes are necessarily interfered with, until it becomes a question how the right which each person has of prosecuting his lawful business in a reasonable and proper manner shall be made

¹ *Accord: Hauck v. Tidewater Pipe Line*, 153 Pa. St. 366; *Rogers v. Phila. Traction Co.*, 182 Pa. St. 473 (1897). See *Schopp v. St. Louis*, 117 Mo. 131 (1893), holding that no immunity attaches to a license granted not for the public good but for the benefit of the licensee; and compare *Jones v. Sanitary District of Chicago*, 252 Ill. 591 (1912), holding that legislative authority to a sanitary district gave immunity for only those the works for which compensation had been paid or secured, with *Boothby v. Androscoggin & C. R. Co.*, 51 Maine 318 (1863).

consistent with the other right which each person has to be free from unreasonable disturbance in the enjoyment of his property. *Merrifield v. Worcester*, 110 Mass. 216, 219. In this conflict of rights, police regulations by the legislature find a proper office in determining how far and under what circumstances the individual must yield with a view to the general good.

It is ordinarily a proper subject for legislative discretion to determine by general rules the extent to which those who are engaged in customary and lawful and necessary occupations shall be required or allowed to give signals or warnings by bells or whistles, or otherwise, with a view either to the public safety, as in the case of railroads, or to the necessary or convenient operation and management of their own works; and ordinarily such determination is binding upon the courts, as well as upon citizens generally. And when the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law. *Bancroft v. Cambridge*, 126 Mass. 441. It is accordingly held in many cases, and is now a well-established rule of law, at least in this commonwealth, that the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operation of the railroad were not authorized by the legislature, must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form. The legislative sanction makes the business lawful, and defines what must be accepted as a reasonable use of property and exercise of rights on the part of the railroad company, subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others. And the same rule extends to other causes of annoyance which are regulated and sanctioned by law.

The recent case of *Baltimore & Potomac Railroad v. Fifth Baptist Church*, 108 U. S. 317, is strongly relied on by the defendants as an authority in their favor. There are, however, two material and decisive grounds of distinction between that case and this. There the railroad company had only a general legislative authority to construct works necessary and expedient for the proper completion and maintenance of its railroad, under which authority is assumed to build an engine-house and machine-shop close by an existing church, and it was held that it was never intended to grant a license to select that particular place for such works, to the nuisance of the church. Moreover, in that case, the disturbance was so great as not only to render the church uncomfortable, but almost unendurable as a place of worship, and it virtually deprived the owners of the use and enjoyment of their property. We do not understand that it was intended to lay down, as a general rule applicable to all cases of comparatively slight though real annoyance, naturally and neces-

sarily resulting in a greater or less degree to all owners of property in the neighborhood from a use of property or a method of carrying on a lawful business which clearly falls within the terms and spirit of a legislative sanction, that such sanction will not affect the claim of such an owner to relief; but rather that the court expressly waived the expression of an opinion upon the point.

In this Commonwealth, as well as in several of the United States and in England, the cases already cited show that the question is settled by authority, and we remain satisfied with the reasons upon which the doctrine was here established. Courts are compelled to recognize the distinction between such serious disturbances as existed in the case referred to, and comparatively slight ones, which differ in degree only, and not in kind, from those suffered by others in the same vicinity. Slight infractions of the natural rights of the individual may be sanctioned by the legislature under the proper exercise of the police power, with a view to the general good. Grave ones will fall within the constitutional limitation that the legislature is only authorized to pass reasonable laws. The line of distinction cannot be so laid down as to furnish a rule for the settlement of all cases in advance. The difficulty of marking the boundaries of this legislative power, or of prescribing limits to its exercise, was declared in *Commonwealth v. Alger*, 7 Cush. 53, 85, and is universally recognized. Courts, however, must determine the rights of parties in particular cases as they arise; always recognizing that the ownership of property does not of itself imply the right to use or enjoy it in every possible manner, without regard to corresponding rights of others as to the use and enjoyment of their property; and also that the rules of the common law, which have from time to time been established, declaring or limiting such rights of use and enjoyment, may themselves be changed as occasion may require. *Munn v. Illinois*, 94 U. S. 113, 134.

In the case before us, looking at it for the present without regard to the decree of the court in the former case between these parties, we find nothing in the facts set forth which show that the statutes relied on as authorizing the plaintiffs to ring their bell (St. 1883, c. 84) should be declared unconstitutional. It is virtually a license to manufacturers, and others employing workmen, to carry on their business in a method deemed by the legislature to be convenient, if not necessary, for the purpose of giving notice, by ringing bells, and using whistles and gongs, in such manner and at such times as may be designated in writing by municipal officers.

The defendants, however, contend that a different question arises in the present case, where the plaintiffs rely upon a legislative sanction given to acts after it had been determined by this court that the doing of them was attended with a peculiar injury to the defendants, which entitled them to a remedy as for a nuisance. There can be no doubt that such sanction would be a good defence to an indictment for a nuisance; or to a proceeding instituted by an individual, whose only grievance was that he had sustained special damage in consequence of being disturbed in the enjoyment of some

public right, such as a right to travel upon a highway or river. His public right may clearly be regulated and controlled by the legislature, after a decision by the court as well as before. *Commonwealth v. Essex Co.*, 13 Gray, 239, 247. But the argument is urged upon with great force, that in the present case there had been a judicial determination that the ringing of the bell, at the hours now authorized by the terms of the statute and the designation of the selectmen, was a private nuisance to the defendants, not growing out of any public right, and that the statute ought not, as a matter of construction, to be held applicable to this case; or, if such is its necessary construction, that it is unconstitutional, as interfering with their vested rights.

In the first place, we can have no doubt that the statute by its just construction is in its terms applicable to the present case. It is undoubtedly true that neither a general authority nor a particular license is to be so construed as to be held to sanction what was not intended to be sanctioned. A general authority is not necessarily to be treated as a particular license; *Commonwealth v. Kidder*, 107 Mass. 188; and in some cases, even where a particular license or authority has been given, as to keep an inn, alehouse, or slaughterhouse in a particular place, which is specified, this authority has not been deemed to sanction the keeping of it in an improper manner. *Rex v. Cross*, 2 C. & P. 483. *Commonwealth v. McDonough*, 13 Allen, 581, 584. *State v. Mullikin*, 8 Blackf. 260. *United States v. Elder*, 4 Cranch. C. C. 507. And, ordinarily, a statute which authorizes a thing to be done, which can be done without creating a nuisance, will not be deemed to authorize a nuisance. In such case, it is not to be assumed that it was contemplated by the legislature that what was so authorized would have the necessary effect to create a nuisance, or that it would be done in such a manner as to create a nuisance; and, if a nuisance is created, there will in such cases ordinarily be a remedy at law or in equity. *Eames v. New England Worsted Co.*, 11 Met. 570. *Haskell v. New Bedford*, 108 Mass. 208, 215. *Commonwealth v. Kidder*, 107 Mass. 188. But, on the other hand, the authority to do an act must be held to carry with it whatever is naturally incidental to the ordinary and reasonable performance of that act. When the legislature authorized factory bells to be rung, it must have been contemplated that they would be heard in the neighborhood. That is a natural and inevitable consequence. The legislature must be deemed to have determined that the benefit is greater than the injury and annoyance; and to have intended to enact that the public must submit to the disturbance, for the sake of the greater advantage that would result from this method of carrying on the business of manufacturing. It must be considered, therefore, in this case, that a legislative sanction has been given to the very act which this court found to create a private nuisance.

It is then argued that the Legislature cannot legalize a nuisance, and cannot take away the rights of the defendants as they have been ascertained and declared by this court; and this is undoubtedly

true, so far as such rights have become vested. For example, if the plaintiff under an existing rule of law has a right of action to recover damages, for a past injury suffered by him, his remedy cannot be cut off by an act of the legislature. But, on the other hand, the legislature may define what in the future shall constitute a nuisance, such as will entitle a person injured thereby to a legal or equitable remedy, and may change the existing common-law rule upon the subject. It may declare, for the future, in what manner a man may use his property or carry on a lawful business without being liable to an action in consequence thereof; that is, it may define what shall be a lawful and reasonable mode of conduct. This legislative power is not wholly beyond the control of the courts, because it is restrained by the constitutional provision limiting it to wholesome and reasonable laws, of which the court is the final judge; but, within this limitation, the exercise of all the police power of the legislature will apply to all within the scope of its terms and spirit. The fact that the rights of citizens, as previously existing, are changed, is a result which always happens; it is indeed in order to change those rights that the police power is exercised. So far as regards the rights of parties accruing after the date of the statute, they are to be governed by the statute; their rights existing prior to that date are not affected by it. To illustrate this view, let it be supposed that the case between the present parties in its original stage has been determined in favor of the manufacturers, under which decision they would have had a right to ring their bell; and that afterwards a statute had been passed providing that manufacturers should not ring bells except at such hours as might be approved by the selectmen; and that these manufacturers had then proceeded to ring their bells at other hours, not included in such approval. It certainly could not be said that they had vested a right to do so, under the decision of the court.

The injunction which was awarded by the court, upon the facts which appeared at the hearing, did not imply a vested right in the present defendants to have it continued permanently. Though a final determination of the case before the court, and though binding and imperative upon the present plaintiffs, and enforceable against them by all the powers vested in a court of equity, yet they were at liberty at any time, under new circumstances making it inequitable for it to be longer continued, to apply to the court for a review of the case and a dissolution of the injunction.

*Demurrer overruled.*¹

¹ *Accord: Muriha v. Lovewell*, 166 Mass. 391 (1896), injunction refused against persons melting iron under license from mayor and aldermen; *Levin v. Goodwin*, 191 Mass. 341 (1906), licensed bowling alley causing only such noise, while considerable and annoying to neighbors, as is incident to such alley properly operated. But the legislature may "authorize small nuisances without compensation not great ones." *Bacon v. Boston*, 154 Mass. 100 (1891), serious disturbance of adjacent owner's enjoyment of his premises by offensive odors and percolation of filthy matter, caused by the city's operation under statutory power of a sewage disposal plant, while not a taking of the land for which compensation was recoverable under the statute, was ac-

tionable in an action of tort, see *Ganster v. Met. Elec. Co.*, 214 Pa. 628 (1906), and *Baltimore & Potomac R. Co. v. Church*, 108 U. S. 317 (1883), and *Shively v. Cedar Rapids &c. R. Co.*, 74 Iowa 169 (1887). In *Cohen v. Rittirmann*, 139 S. W. 59 (Tex. Civ. App. 1911), it is held that a municipal license under legislative power will not give right to carry on a business endangering the lives, health or property of its citizens; see also *Towaliga Falls Power Co. v. Sims*, 6 Ga. App. 749 (1909), doubting the power of the legislature to "authorize the doing of a thing which in its nature would tend to destroy or materially impair the morals, the health or the safety of the people."

Part 3

The Effect of the Plaintiff's Fault as a Bar to Recovery for Injury Caused in Part Thereby.

VIRTUE *v.* BIRDE.

Court of King's Bench, 1677. 2 Lev. 196.

Case, that whereas the defendant had hired him to carry a load of timber from Woodbridge to Ipswich to be laid there at any place the defendant should appoint, and that he gave notice to the defendant that he would carry it such a day, and requested the defendant at Woodbridge to appoint where it should be laid, and that accordingly he carried it to Ipswich, and that the defendant appointed no place where it should be laid, but made the horses of the plaintiff being hot stay so long in the cart, that they took cold, whereby some of them died, and the rest were spoiled. And after verdict for the plaintiff upon *non culp.*, judgment was staid; because the action lies not. For, 1. he might have taken his horses out of his cart, and have walked them up and down, or put them into the stable; 2. As soon as he came there, and found no place appointed by the defendant, he might have unladen the timber in any convenient place, and returned. And therefore the injury which the horses received is owing to himself, and through his own default.

WARD *v.* AYRE.

Court of King's Bench, 1615. Cro. Jac. 366.

Trespass of assault and battery, etc., *quod cumulum pecuniae*, containing five marks, *cepit*, etc. The case was: The plaintiff and defendant being at play, the plaintiff thrust his money into the defendant's heap and mixed it, and the defendant kept it all; whereupon (they striving for the money) plaintiff brought this action.

The whole Court were of opinion, in regard the plaintiff's own money cannot be known, and this his intermeddling is his own act and his own wrong, that by the law he shall lose all; for, if it were otherwise, a man might then be made to be trespasser against his will, by the taking of his own goods; therefore, to avoid that inconvenience, the law will justify the defendant's detaining of all: and so it is of an heap of corn voluntarily intermingled with another man's. Whereupon the rule of the Court was, *quod querens nihil capiat per billam*.

LORD KENYON, C. J., in *Pasley v. Freeman*, 3 Term Rep. 51 (1788):

"Undoubtedly where the common prudence and caution of man are sufficient to guard him the law will not protect him in his negligence."¹

CHAPTER I.

The Plaintiff's Deliberate Choice to Encounter a Known Risk Created by the Defendant.

CRUDEN *v.* FENTHAM.

Court of King's Bench, at Nisi Prius, 1799. 2 Espinasse's R. 685.

This was an action for negligently driving the defendant's chaise, by which the plaintiff's horse was killed.

The case in evidence was, the defendant was returning to town in a one-horse chaise, with his family, from Tooting in Surry. He was driving on the wrong side of the road. The plaintiff's servant was on horseback, going from London. The road was of very considerable breadth, so that the servant could have passed without any difficulty; but he, without any reason, but conceiving it to be the right of the road, crossed over to the side where the chaise was driving, that being the right side of the road; and endeavoring to pass between the chaise and the foot-way the horse was killed.

LORD KENYON, in summing up to the jury, told them, that what was called the law of the road was introduced for general convenience: That where carriages were driving on a narrow road, or where accidents might happen, it ought to be adhered to; and in driving at night the rule ought to be strictly adhered to, and never departed from, as it was the only mode by which accidents could be avoided: But he thought that where the road was sufficiently broad for all persons and carriages to pass, though a carriage might be driving on the wrong side of the road, if there was sufficient room for other carriages and horses to pass on the other, a person was not justified in crossing out of the way, in order to assert what he termed the right of the road. It was putting himself voluntarily into the way of danger, and the injury was of his own seeking. That seemed to be the case here: but the jury were to be of that opinion; if they thought otherwise they would find for the plaintiff.

The jury found a verdict for the plaintiff.

Erskine and ——— for the plaintiff.

Garrow for the defendant.

A rule was afterwards obtained for a new trial. In Easter term it came on, when the Lord Chief Justice delivered himself in nearly the same terms; but added, that after the finding of the jury, as it was a question of public convenience, the verdict had better rest as it was.

New trial refused.

¹ See also, the cases and notes in Book II, Part IV, Chapter 1 (d).

CLAY v. WOOD.

Court of King's Bench, at Nisi Prius, 1803. 5 Espinasse's R., 44.

This was an action on the case, for negligently driving a chaise against a certain horse of the defendant's, on which the plaintiff's servant then rode, by which he had his thigh broke; in consequence of which he died.

The facts were, that the plaintiff's servant was riding on the wrong side of the road; but near the middle of it. The defendant was the owner of a chaise, then driven by his servant, coming out of another road, and crossing the road over to that side of the road on which the servant was riding, which was the proper side of the road for the defendant. In so crossing over, the shaft of the chaise struck the horse in the thigh, and broke it.

The defendant's counsel replied, That it was the duty of the servant to have kept on his proper side; and that the accident being occasioned by his being so out of his place, the defendant was not liable.

LORD ELLENBOROUGH said, That the circumstance of the person being on the wrong side of the road was not sufficient to discharge the defendant; for though a person might be on his wrong side of the road, if the road was of sufficient breadth, so that there was full and ample room for the party to pass, he was of opinion he was bound to take that course which should carry him clear of the person who was on his wrong side; and that if any injury happened, by running against such person, he would be answerable. A person being on his wrong side of the road could not justify another in wantonly doing an injury, which might be avoided. The question therefore to be left to the jury was, Whether there was such room, that though the plaintiff's servant was on his wrong side of the road, there was sufficient room for the defendant's carriage to pass between the plaintiff's horse and the other side of the road? If they were of opinion that there was, the plaintiff was entitled to recover.

Verdict for the plaintiff.

CLAYARDS v. DETHICK.

Court of Queen's Bench, 1848. 12 Q. B. (N. S.) 439.

On the trial before Lord Denman, C. J., it appeared that the plaintiff was the proprietor of a livery stable at Gower Mews. The Mews communicated with the street by a passage and had no other outlet. The defendant, acting under the orders of the Commissioner of Sewers, was deepening the sewer in Gower street, for this purpose they made an open trench which obstructed the passage except for a space of four feet on one side and two and a half feet on the other. Before the day on which the accident happened the commissioners had given notice to the owners of stables in the Mews that the trench would remain open for a few days and that they must put up with it and had advised them to get other stables.

On the day of the accident excavators had thrown earth from the trench unavoidably, as was represented by the defendants, upon

the four foot space and to the height of four feet. The plaintiff was bringing one of his horses out of the Mews and was about to put planks over the trench when one of the defendants said he would not be answerable for anything that happened in taking the horse over in that manner. The plaintiff then asked how he was to do it, and said he must get the horse out. The defendant said, "Take him out on the other side (where the earth had been thrown) and I will be answerable." The plaintiff with assistance led the horse out. A little later the plaintiff tried to get another horse out in the same way but the horse fell into the trench and was killed. There was evidence on the part of the defendant that on the second occasion their men cautioned the plaintiff not to make the attempt, that he would not only endanger his horse but the lives of the men in the trench, but he said he would go over. This statement was denied on the part of the plaintiff.

The Lord Chief Justice in summing up observed "that, if the defendants' witnesses were to be believed, and the plaintiff on the second occasion had, in defiance of warning, incurred an evidently great danger, this was a rashness on his part which would excuse the defendants: but that it could not be the plaintiff's duty to refrain altogether from coming out of the mews merely because the defendants had made the passage in some degree dangerous: that the defendants were not entitled to keep the occupiers of the mews in a state of siege till the passage was declared safe, first creating a nuisance and then excusing themselves by giving notice that there was some danger: though, if the plaintiff had persisted in running upon a great and obvious danger, his action could not be maintained. And he left it to the jury to say whether or not the plaintiff had so acted. Verdict for plaintiff: damages £20.

Miller, in Trinity term, 1847, moved for a new trial on the ground of misdirection. He contended that the plaintiff here committed such fault by attempting to bring his horse out of the mews, if the passage was at all dangerous; and that, instead of incurring danger even if it had been slight, he should have kept his horse in the stable, and brought an action, if necessary, for the obstruction. (LORD DENMAN, C. J. I thought the plaintiff might be justified in incurring a moderate danger, and that the facts proved as to the first coming out shewed it to be no more.) A rule nisi was granted.

Knowles and Corrie now showed cause. The Lord Chief Justice left to the jury, substantially, whether the plaintiff was in fault at all. And he was not. He could not afford to keep his horse at home. (COLERIDGE J. If the horse was wrongfully detained at home, an action lay for that.)

Miller, contra. Here the plaintiff had an obvious danger before him, and was not justified in encountering it to avoid a delay. For that he might have had a legal remedy: if he chose rather to incur a danger, he might do so, but not at the cost of the defendants. If an extraordinary emergency had arisen, as a fire, the case might have been different. (PATTESON J. Suppose the horse had been coming home; must he have been kept out of the stable till the

entrance was pronounced safe?) The plaintiff might have placed the horse at livery and brought an action for the keep.

PATTESON, J. The question arises on the declaration; because it is there said that the defendants made the trench, and laid rubbish, and neglected to fence, and that "by means of the premises" the plaintiff's horse fell and was killed. The averment, "by means of the premises," becomes parcel of the issue on Not guilty. And, such being the issue, we are to say whether it was properly left to the jury. Now the defendants had clearly no right to leave a trench open in the passage to this mews without a proper fence, and, having done so, to tell the plaintiff "you shall keep your horse in the stable till we inform you that you may remove him." But whether or not the plaintiff contributed to the mischief that happened by want of ordinary caution, is a question of degree. If the danger was so great that no sensible man would have incurred it, the verdict must be for the defendants; and the case was rightly put to the jury as depending on this question. The plaintiff here had passed safely in the afternoon over the place at which the accident happened. According to the evidence for the defendants, he was told, on attempting to pass in the evening, that he could not do it without danger to himself and the men below. The jury, however, do not appear to have believed this statement. The whole question was, whether the danger was so obvious that the plaintiff could not with common prudence make the attempt. That was properly put to the jury; and they have found for the plaintiff.

COLERIDGE J. The plaintiff was not bound to abstain from pursuing his livelihood because there was some danger. It was necessary for the defendants to shew a clear danger and a precise warning. Whether these facts existed or not, was for the consideration of the jury; and if the jury disbelieved them, the plaintiff was entitled to the verdict.

LORD DENMAN C. J. The case was complicated; and there was contradiction on almost every point. I have no doubt that I left it to the jury to say whether the plaintiff had used ordinary care; for I always leave cases of the kind in that manner. I certainly told the jury that the plaintiff was not bound to keep his horse back unless the danger was imminent: and I believe they gave credit to the plaintiff's evidence, and not to the evidence for the defendants.

Rule discharged.¹

¹ Compare *Pomeroy v. Westfield*, ante, p. 337, and cases cited in the note thereto.

See also, Lord Bramwell's vigorous criticism of the principal case in *Lar v. Darlington*, L. R. 5 Ex. Div. 28 (1879), p. 35, and in some observations printed in Horace Smith on Negligence, 2nd Ed., Appendix B., p. 275.

For the decisions on the somewhat similar case of a passenger on a railway train, who being confronted with the real or apparent alternatives of being carried beyond his station or alighting while the train is in motion, chooses the latter, see cases cited in note 3 to *Osborne v. London etc. R. Co.*, ante, page 344.

HARDING v. PHILA. RAPID TRANSIT CO.

Supreme Court of Pennsylvania, 1907. 217 Pa. St. 69.

PER CURIAM. There was no evidence of defendant's negligence. The plaintiff had no recollection of the accident and the witnesses on his side who saw it only said in general terms that when the two cars passed each other the running board of the one on which plaintiff stood was crowded and several men jumped, fell or were pushed or brushed off. A witness for the defense testified that as the cars passed a man on plaintiff's car extended his hand, grasped the other car and was thrown backwards against the men behind him, including plaintiff. This is the most plausible account that was given, and apart from it there is nothing to show that plaintiff on the approach of the car did not lose his nerve and jump or fall from the car.

Under the circumstances there was no presumption of negligence on the part of defendant, but even if it had been clearly shown it would have been altogether immaterial. Plaintiff was riding voluntarily in a place of manifest danger, and in so doing he assumed all the risks of the situation. One who takes a position of manifest and imminent danger assumes the risk of his position whether he could have got a safer place or not: *Bard v. Traction Co.*, 176 Pa. 97; *Malpass v. Pass. R. R. Co.*, 189 Pa. 599.

It is argued by appellant that he was not warned by the conductor of the danger of his position. But the lowered bar was sufficient warning in itself. It was notice that the running board on that side was a place of danger and that passengers not expected, nor so far as the company could control the situation permitted, to use it even for the limited purpose of getting on or off the car for which the running board is intended. The alternative offered by plaintiff of having to wait for another car and thus being late in getting home is no justification. In any country than this, plaintiff would have been forcibly prevented from getting on the car at all after the number of passengers had reached the limit of safety or even of convenience. To attempt the enforcement of such a regulation here would certainly lead to continual quarrels and breaches of the peace. A reasonable amount of concession, therefore, to the American's impatience of control and confidence in his own ability to take care of himself should not be visited with punishment by the infliction of penalties on the company for the passenger's own fault. It must be definitely recognized that one who undertakes to ride on the running board outside of a lowered bar, is negligent per se and can not recover for injuries incident to his position, whether he could have got a safer position or not.

Judgment affirmed.¹

¹ See however, *Watson v. Portland etc. Ry. Co.*, and *Cattano v. Metropolitan Street R. Co.*, cited in note 2 to *Southwick v. Hall and Upson Co.*, ante.

ECKERT v. LONG ISLAND RAILROAD CO.¹ *ante*, page 345.

LIMING v. ILLINOIS CENTRAL RAILWAY COMPANY,¹
ante, page 348.

TAYLOR v. HOME TELEPHONE CO.

Supreme Court of Michigan, 1910. 163 Mich. 458.

It is alleged in the declaration and proved by the evidence that the defendant company had negligently removed the service cock from a city water main and that as a consequence water was forced into the open second story window of a building into apartments of which the plaintiff was the caretaker. In attempting to close the window the plaintiff was knocked down by the force of the stream of water and her clothing was soaked, as a consequence giving her a severe cold and rheumatism.

The court directed a verdict for the defendant and judgments were entered thereon. The case presents the question whether, conceding the defendant to have been negligent, the plaintiff is entitled to the verdict of the jury.

OSTRANDER, J. (after stating the facts). The plaintiff's act was voluntary, the wetting she got was inevitable. Did she, as defendant contends, assume all the consequences of the wetting, whatever they might be? The principle expressed in the maxim, "*Volenti non fit injuria*," is subject to qualifications, which are sometimes stated as qualifications of the rule, but are quite as often recognized as rules in determining the proximate cause of an injury and the

¹ *Accord*: *Dixon v. New York, N. H. & H. R. Co.*, 207 Mass. 126 (1910).

² In addition to the cases cited in the notes *ante*, see *accord*: *Pullman Palace Car Co. v. Laack*, 143 Ill. 242 (1892); *Penna. Co. v. McCaffrey*, 139 Ind. 430 (1894); *Louisville & C. R. Co. v. Seibert*, 21 Ky. L. 1603 (1900); *Winczewski v. Winona & W. R. Co.*, 80 Minn. 245 (1900); *Dailcy v. Burlington & M. etc. R. Co.*, 58 Nebr. 396 (1899); *Texas Central R. Co. v. Bender*, 32 Tex. Civ. App. 568 (1903); *Kelley v. Chicago, M. & St. P. R. Co.*, 50 Wis. 381 (1880); *Fisher v. Chesapeake & Ohio R. Co.*, 104 Va. 635 (1905). But if the injury threatened to the property, in this case of the plaintiff's employer, be slight and the risk to the plaintiff great, he can not recover, *Judkins v. Maine Cent. R. Co.*, 80 Maine 417 (1888).

Contra, *Condiff v. Kansas City, Ft. S. & G. R. Co.*, 45 Kans. 256 (1891); *Eversole v. Wabash R. Co.*, 249 Mo. 523 (1913); *Morris v. Lake Shore & M. S. R. Co.*, 148 N. Y. 182 (1896); *Maltbie v. Belden*, 167 N. Y. 307 (1901); *Seale v. Gulf, C. & S. F. R. Co.*, 65 Tex. 274 (1886). In *Chattanooga Light & Power Co. v. Hodges*, 109 Tenn. 331 (1902), the court, while refusing to decide between the two views, held that the defendant could not have contemplated that the plaintiff would return to his master's burning building in an effort to communicate with him by the telephone therein and so even if the fire was started by the defendant's negligence, such negligence was not the proximate cause of the plaintiff's negligence.

contributory negligence of the injured person. Courts have frequently refused to so apply the principle as to deny to one who has at actual risk of injury sought to save property or a person from damage or destruction the right to recover damages. A valuable collection of authorities appears in the notes to *Fisher v. Railway Co.* (Va.), 2 L. R. A. (N. S.) 954. See also, 1 Thompson on Law of Negligence, § 185 *et seq.*

In *Cook v. Johnston*, 58 Mich. 437 (25 N. W. 388, 55 Am. Rep. 703), the plaintiff entered a burning shed to release a horse belonging to her husband and was burned. Under the circumstances, and as matter of law, the right to recover was denied.

In these, as in all of the cases which have been examined, there was, or was supposed to be, a chance, more or less probable, of escaping any direct consequences of defendant's negligence. In the case at bar no such chance existed or could have been supposed to exist. May the plaintiff say that the consequences other than a mere wetting were not anticipated by her, and therefore the peril of them was not assumed, and at the same time insist that they were the direct result of defendant's negligence—of the single occurrence—and defendant must respond in damages? We are of the opinion that she may not do so, and that the maxim referred to must be applied.

CAMPBELL et al. v. SEAMAN.

Court of Appeals of New York, 1876. 63 N. Y. 568.

The action was brought to recover damages resulting from defendant's use of his land as a brick kiln for the manufacture of bricks, which was alleged to be a nuisance by reason of the sulphurous acid gas required therefor, and to restrain the continuance of such nuisance.

EARLE, J. (After determining that the brick yard as operated was a nuisance.) But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he make an unreasonable, unwarrantable or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of a nuisance to his neighbor. And the law will hold him responsible for the consequent damage. As to what is a reasonable use of one's own property can not be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which under other circumstances, would be unlawful, unreasonable and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment especially uncomfortable or inconvenient.

It matters not that the brick-yard was used before plaintiffs

bought their lands or built their houses. (*Taylor v. The People*, 6 Parker Cr., 352; *Wier's Appeal*, 74 Penn., 230; *Brady v. Weeks*, 3 Barb. 156; *Barnwell v. Brooks*, 1 Law Times (N. S.) 454.) One can not erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected. He may make a reasonable and lawful use of his land and thus cause his neighbor some inconvenience, and probably some damage which the law would regard as *damnum absque injuria*. But he can not place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow.¹

LEROY FIBRE CO. v. CHICAGO, M. & ST. P. R. CO.

Supreme Court of the United States, 1914. 232 U. S. 340.

The LeRoy Fibre Company brought an action against defendant in a state court of Minnesota to recover the value of certain flax straw alleged to have been negligently burned and destroyed by defendant. The cause was removed to the circuit for the district of Minnesota, where it was tried. One of the grounds of negligence set forth was that a locomotive engine of defendant, while passing the premises of plaintiff, was so negligently managed and operated by de-

¹ Though Blackstone in his commentaries, Vol. 2, 403, stated that "if my neighbor makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is my own seeking and may continue"; the view expressed in the principal case was adopted in *Bamford v. Turnley*, 3 B. & S. 62 (1862), and *St. Helens Smelting Co. v. Tipping*, 11 H. L. C. 642 (1865).

Accord: *Bliss v. Hall*, 4 Bing. New Cas. 183 (1838); *Crump v. Lambert*, L. R. 3 Eq. 409 (1867); *Hurlbut v. McKone*, 55 Conn. 31 (1887); *Lafin & Rand Powder Co. v. Tearney*, 131 Ill. 322 (1890); *Baker v. Leka*, 48 Ill. App. 353 (1892); *Bushnell v. Robeson*, 62 Iowa 540 (1883); *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268 (1890); *Baltimore v. Fairfield Co.*, 87 Md. 352 (1898); *O'Brien v. St. Paul*, 18 Minn. 176 (1872); *King v. Morris & E. R. Co.*, 18 N. J. Eq. 397 (1867); *Brady v. Weeks*, 3 Barb. 157 (N. Y. 1848); *Dallas v. Ladies Art Club*, 4 Pa. Co. Ct. Rep. 340 (1887); *City of Sherman v. Langham*, 13 S. W. 1042 (Supreme Ct. of Texas 1890); and see *Wier's Appeal*, 74 Pa. 230 (1873). In some of these cases the plaintiff purchased the property after the erection of the defendant's nuisance, in others he thereafter devoted his land to new uses to which only was the defendant's conduct injurious.

The plaintiff may, however, so far encourage the defendant in erecting the nuisance or acquiesce in his expending money in its erection as to lose his right to either equitable or legal relief, *Huntington and Kenova Land Development Co. v. Phoenix Powder Mfg. Co.*, 40 W. Va. 711 (1895) and cases cited therein; where the plaintiff company believing that the erection of the defendants' plant in its tract would aid its development, induced it to purchase part of its tract and build a mill, but afterwards finding the mill was a detriment and not an advantage to their remaining land, sought to enjoin the mill as a nuisance; see also, *Chaffee v. Telephone Co.*, 77 Mich. 625 (1889), and *Alexander v. Kerr*, 2 Rawle 83 (Pa. 1828).

defendant's employees that it emitted and threw sparks and coal of unusual size upon the stacks of flax straw, and thereby set fire to and destroyed them.

The evidence at the trial showed the following facts: Some years after the defendant had constructed its line, the plaintiff established a factory for the manufacture of tow from flax straw. Upon its land, adjoining its factory and abutting on the defendants' right of way, it stored flax straw in parallel rows of stacks, the nearest some seventy-five feet, the other eighty-five feet, from the center of the right of way. There was some substantial evidence tending to show that a live cinder was emitted by a negligently operated engine of the defendant and carried by a high wind, then prevailing, into contact with one of the farther rows of stacks, which, being highly inflammable, it ignited. It was contended at the trial by the defendant, that plaintiff itself was negligent, and that its negligence contributed to the destruction of its property. There was no evidence that plaintiff was negligent save that it had placed its property of an inflammable character upon its own premises so near the railroad tracks, that is to say, the first row of stacks, 70 or 75 feet, and the second row, in which the fire started, about 85 feet from the center of the railroad track. In other words, the character of the property and its proximity to an operated railroad, for which plaintiff was responsible, was the sole evidence of plaintiff's contributory negligence.

The trial court charged the jury that though the destruction of the straw was caused by defendant's negligence, yet if the plaintiff, in placing and maintaining two rows of stacks of flax straw within a hundred feet of the center line of the railroad, failed to exercise that ordinary care to avoid danger of firing its straw from sparks from engines passing on the railroad that a person of ordinary prudence would have exercised, under like circumstances, and that the failure contributed to cause the accident, the plaintiff could not recover. The trial court also submitted two questions to the jury, as follows:

"1. Did the Fibre Company, in placing and keeping two rows of flax straw within 100 feet of the center line of the railroad, fail to use the care to avoid danger to its straw from sparks of fire from engines operating on that railroad, that a person of ordinary prudence would have used under like circumstances? 2. Did the engineer McDonald fail to use that degree of care to prevent sparks from his engine from firing the stacks as he passed them, on April 2, 1907, that a person of ordinary prudence would have used under like circumstances?"

"The jury answered both questions in the affirmative and found a general verdict for the defendant. Judgment was accordingly entered for defendant. The plaintiff duly saved exceptions to the charge of the court regarding its contributory negligence and to the submission of the first question to the jury, and has assigned the action of the court as error."

MR. JUSTICE McKENNA delivered the opinion of the court:

The questions certified¹ present two facts—(1) The negligence of the railroad was the immediate cause of the destruction of the property. (2) The property was placed by its owner near the right of way of the railroad, but on the owner's own land.

The query is made in the first two questions whether the latter fact constituted evidence of negligence of the owner, to be submitted to the jury. It will be observed, the use of the land was of itself a proper use,—it did not interfere with nor embarrass the rightful operation of the railroad. It is manifest, therefore, the questions certified, including the third question, are but phases of the broader one, whether one is limited in the use of one's property by its proximity to a railroad; or, to limit the proposition to the case under review, whether one is subject in its use to the careless as well as to the careful operation of the road. We might not doubt that an immediate answer in the negative should be given if it were for the hesitation of the circuit court of appeals, evinced by its questions, and the decisions of some courts in the affirmative. That one's uses of his property may be subject to the servitude of the wrongful use by another of his property seems an anomaly. It upsets the presumptions of law, and takes from him the assumption, and the freedom which comes from the assumption, that the other will obey the law, not violate it. It casts upon him the duty of not only using his own property so as not to injure another, but so as to use his own property that it may not be injured by the wrongs of another. How far can this subjection be carried? Or, confining the question to railroads, what limits shall be put upon their immunity from the result of their wrongful operation? In the case at bar, the property destroyed is described as inflammable, but there are degrees of that quality; and how wrongful must be the operation? In this case, large quantities of sparks and "live cinders" were emitted from the passing engine. Houses may be said to be inflammable, and may be, as they have been, set on fire by sparks and cinders from defective or carelessly handled locomotives. Are

¹ The following questions were certified:

"1. In an action at law by the owner of a natural product of the soil, such as flax straw, which he lawfully stored on his own premises, and which was destroyed by fire caused by the negligent operation of a locomotive engine, to recover the value thereof from the railroad company operating the engine, is it a question for the jury whether the owner was also negligent, without other evidence than that the railroad company preceded the owner in the establishment of its business, that the property was inflammable in character, and that it was stored near the railroad right of way and track?"

"2. Is it a question for the jury whether an owner who lawfully stores his property on his own premises adjacent to a railroad right of way and track is held to the exercise of reasonable care to protect it from fire set by the negligence of the railroad company, and not resulting from unavoidable accident or the reasonably careful conduct of its business?"

"3. As respects liability for the destruction by fire of property lawfully held on private premises adjacent to a railroad right of way and track, does the owner discharge his full legal duty for its protection if he exercises that care which a reasonable prudent man would exercise under like circumstances to protect it from the dangers incident to the operation of the railroad, conducted with reasonable care?"

they to be subject as well as stacks of flax straw, to such lawless operation? And is the use of farms also, the cultivation of which the building of the railroad has preceded? Or is that a use which the railroad must have anticipated, and to which it hence owes a duty, which it does not owe to other uses? And why? The question is especially pertinent and immediately shows that the rights of one man in the use of his property can not be limited by the wrongs of another. The doctrine of contributory negligence is entirely out of place. Depart from the simple requirement of the law, that every one must use his property so as not to injure others, and you pass to refinements and confusing considerations. There is no embarrassment in the principle even to the operation of a railroad. Such operation is a legitimate use of property; other property in its vicinity may suffer inconveniences and be subject to risks by it, but a risk from wrongful operation is not one of them.

The legal conception of property is of rights. When you attempt to limit them by wrongs, you venture a solecism. If you declare a right is subject to a wrong, you confound the meaning of both. It is difficult to deal with the opposing contention. There are some principles that have axiomatic character. The tangibility of property is in its uses, and that the uses by one owner of his property may be limited by the wrongful use of another owner of his is a contradiction. But let us pass from principle to authority.

Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356, was an action for damages for the destruction of a sawmill, lumber shed, and other buildings and manufactured lumber, by fire communicated by a locomotive engine of a railroad. Some of the buildings were erected in part on the company's land near its track, and the railroad company requested the court to charge the jury that the erection of the buildings or the storing of lumber so near the company's track, as the evidence showed, was an improvident or careless act, and that if such location contributed in any degree to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the railroad company's locomotive. The court refused the request and its action was sustained. Mr. Justice Strong, speaking for the court, said: "Such a location, if there was a license for it, (it not then being a trespass), was a lawful use of its property by the plaintiffs; and they did not lose their right to compensation for its loss occasioned by the negligence of the defendant. *Cook v. Champlain Transp. Co.*, 1 Denio, 91; *Fero v. Buffalo & State Line R. Co.*, 22 N. Y. 215, 78 Am. Dec. 178."

In *Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co.*, 1 L. R. A. (N. S.) 533, 71 C. C. A. 316, 139 Fed. 530, there was the destruction of lumber placed on the railroad's right of way by permission of the railroad. It was destroyed by fire occurring through the negligent operation of the railroad's trains. Contributory negligence was urged against the right of recovery. The court (circuit court of appeals for the sixth circuit), commenting on the cases cited by the railroad, said: "But in so far as the opinions go upon the theory that a plaintiff must lose his right of compensation

for the negligent destruction of his own property, situated upon his own premises, because he had exposed it to dangers which would come to it only through the negligence of the railroad company, they do not meet our approval."

After citing cases, the court continued: "The rights of persons to the use and enjoyment of their own property are held upon no such tenure as this. The principle would forbid the use of property for many purposes if in such proximity to a railroad track as to expose it to dangers attributable to the negligent management of its business."² Other cases might be adduced. They are cited in

² See also, the very able opinion of Dixon, C. J., in *Kellog v. Chicago & N. W. R. Co.*, 25 Wis. 223 (1870). It is usually held that a landowner does not assume the risk of fires from the negligent operation of adjacent railroads because he fails to remove therefrom the dry leaves, stubble, grass and other debris which accumulates in the ordinary course of nature, *Vaughan v. The Taff Vale R. Co.*, 3 H. & N. 743 (1858); *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14 (1870); *Fitch v. Pacific R. Co.*, 45 Mo. 322 (1869); *Salmon v. Delaware, L. & W. R. Co.*, 38 N. J. L. 5 (1875); *Philadelphia & R. R. Co. v. Schultz*, 93 Pa. 341 (1880); or because he stores or uses inflammable matter at a point thereon adjacent to the defendant company's tracks, *Kalbfeisch v. Long Island R. Co.*, 102 N. Y. 520 (1886), where the plaintiff was thinning down varnish with benzine outside of his building which adjoined the defendant's right of way; *Southern R. Co. v. Patterson*, 105 Va. 6 (1906), kerosene stored in a warehouse close to the defendant's right of way; *Boston Excelsior Co. v. Bangor*, 93 Maine 52 (1899); *Peter v. Chicago & W. M. R. Co.*, 121 Mich. 324 (1899); *Southern R. Co. v. Wilson*, 138 Ala. 510 (1903); *Cleveland C. C. & St. L. R. Co. v. Scantland*, 151 Ind. 488 (1898); *Erickson v. Penna. R. Co.*, 170 Fed. 572 (1909); *St. Louis R. Co. v. Fire Association*, 55 Ark. 163 (1891). A distinction is, however, drawn in *Murphy v. Chicago etc. R. Co.*, 45 Wis. 222 (1878) and *Coates v. Missouri K. & T. R. Co.*, 61 Mo. 38 (1875), between a failure to remove inflammable matter accumulating naturally and inflammable matter artificially brought upon the premises, see accord, *Macon & W. R. Co. v. McConnell*, 27 Ga. 481 (1859), with which compare *Albany & N. R. Co. v. Wheeler*, 6 Ga. App. 270 (1909).

Nor does the owner who erects a building upon his premises near to the wharf of a steamboat company or the tracks of a railway company assume the risk of injury from fires started by the negligent operation of the boats or engines of such companies, *Cook v. Champlain Transportation Co.*, 1 Denio 91 (N. Y. 1845); *Burke v. Louisville & N. R. Co.*, 7 Heisk. 451 (Tenn. 1872); *Jacksonville R. R. v. Peninsular Land Co.*, 27 Fla. 1 (1891); *Cincinnati N. O. & T. P. R. Co. v. Barker*, 94 Ky. 71 (1893); *Ide v. Boston & Maine R.*, 83 Vt. 66 (1909), nor does he assume such risk because he places a frame house on the premises, *Briant v. Detroit L. & N. R. Co.*, 104 Mich. 307 (1895), or fails to keep the roof in good repair, *Philadelphia R. R. Co. v. Hendrickson*, 80 Pa. 182 (1876).

On the other hand it is sometimes held to be for the jury to say whether the plaintiff is negligent in piling inflammable matter near a railroad track, *Louisville & N. R. Co. v. Short*, 110 Tenn. 717 (1903); *Alabama & V. R. Co. v. Fried Co.*, 81 Miss. 314 (1902); *San Antonio & A. P. R. Co. v. Home Insurance Co.*, 70 S. W. 999 (Texas Ct. of Civ. Appeals 1902), or in locating an oil tank within thirty-six feet of tracks of a railroad, *Confer v. New York L. E. & W. R. Co.*, 146 Pa. St. 31 (1892), or in throwing out straw from a stable very close to the defendants' tracks, during the summer, *Collins v. New York Cent. & H. R. Co.*, 5 Hun 499 (N. Y. 1875); and see *White, J.* in *Post v. Buffalo P. & W. R. Co.*, 108 Pa. 585 (1885); *Fero v. R. R.*, *supra*.

It is to be noted that the plaintiff has the same right to use any part of the defendants' right of way which it permits him to occupy with its license as though it were his own, *Cincinnati N. O. & T. P. R. Co. v. South Fork Coal Co.*, 139 Fed. 528 (1905); 1 L. R. A. (N. S.) 533, and cases cited in the note

Thompson on Negligence, § 2314, and Sherman and Redfield on Negligence, § 680, for the principle that an owner of property is not limited in the uses of his property by its proximity to a railroad, or

in this latter report; but it is contributory wrongdoing to place one's inflammable property upon the railway's right of way without its consent, *Chicago B. & Q. R. Co. v. Cook*, 18 Wyo. 43 (1909). On the other hand if the plaintiff invites upon his premises, for the purpose of serving him in his business, an engine of the defendants which he knows to be out of repair and so to emit sparks, he is bound to take care to protect his nearby property from being ignited by it, his knowledge of the defective condition of the engine and whether he has used due care to protect his property being usually held to be questions of fact for the jury, *Marquette etc. R. Co. v. Spear*, 44 Mich. 169 (1880); *Holman v. Boston Land Co.*, 8 Colo. App. 282 (1896); *Liverpool, London & Globe Ins. Co. v. Southern Pac. R. Co.*, 125 Cal. 434 (1899).

In Massachusetts it was held in *Ross v. B. & W. R. Co.*, 88 Mass. (6 Allen) 87 (1863), that it was a matter for the jury to say whether the plaintiff was guilty of a want of ordinary care in leaving open the door which opened toward the railway in a shed filled with inflammable matter. In *Ingersoll v. Stockbridge & Pittsfield R. Co.*, 90 Mass. 438 (1864), it was held that the general statute, Chap. 68, sec. 101, having made railways responsible for fire communicated by their engines, the plaintiff could recover though his house was situated part on his own land and part, with the defendants' license, upon its right of way. In *Wall v. Pratt*, 169 Mass. 398 (1897), it is said that it would be doubtful whether contributory negligence on the part of the owner of property destroyed by fire communicated by a locomotive engine would be a defense unless so gross as to amount to fraud; but in *Wild v. Boston & M. R. R. Co.*, 171 Mass. 245 (1898), the court doubts whether the right of the property owner is not there (in *Wall v. Pratt*) stated too broadly, but holds that the defendant has no right to complain of an instruction leaving the question to the jury.

Where the defendant negligently or, if a railroad, in breach of its statutory obligation, fails to fence its property or right of way so as to prevent the intrusion of cattle from adjacent property, it held the owner of such property does not, by putting the cattle into a field which he knows is unfenced or where he knows the fence is defective, assume the risk of injury through the escape of his cattle, *McCoy v. California Pac. R. Co.*, 40 Cal. 532 (1871); *Rogers v. Newburyport R. Co.*, 1 Allen 16 (Mass. 1861); *Gardner v. Smith*, 7 Mich. 410 (1859); *Donovan v. Hannibal & St. J. R. Co.*, 89 Mo. 147 (1886); *Cressey v. Northern R. Co.*, 59 N. H. 564 (1880); *Cleveland etc., R. Co. v. Scudder*, 40 Ohio St. 173 (1883); *Heller v. Abbott*, 79 Wis. 409 (1879). In *Wilder v. Maine Cent. R. Co.*, 65 Maine 332 (1876); *Evans v. St. Paul & S. C. R. Co.*, 30 Minn. 489 (1883) and *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665 (1878),—with which compare *Heller v. Abbott*, 79 Wis. 409 (1879),—it was held that it was a question for the jury to say whether under the circumstances the plaintiff's conduct was careful or negligent, while in *Krum & Peters v. Anthony*, 115 Pa. St. 431 (1886), it was held that if the plaintiff put his cattle in a field, knowing that his neighbor had failed to keep in repair the fence around his adjacent quarry as he had agreed to do, he, the plaintiff, was guilty of contributory negligence.

An owner of property whether real or personal is, after knowledge that it has been set on fire, bound to take every reasonable precaution to extinguish it, *Haverly v. State Line & S. R. Co.*, 135 Pa. St. 50 (1890); *Van Dyke v. Grand Trunk R. Co.*, 84 Vt. 212 (1911). So a landowner is bound to restore fences which his neighbor or another has wrongfully broken down and can not recover for the loss of cattle escaping through breaches in the fences left open by him, *Loker v. Damon*, 17 Pick. 287 (Mass. 1835), though he need not find other pasture for his own cattle to such an extent as to diminish the necessary pasturage fields of the plaintiff, *Gilbert v. Kennedy*, 22 Mich. 117 (1871). This is said by Dixon, C. J. in *Kellog v. Chicago R. Co.*, 26 Wis. 223 (1870), not to conflict with the rule announced in the principal case, the distinction being between "known present and immediate dan-

subject to other risks than those which come from the careful operation of the road or unavoidable accident.

The first and second questions we answer in the negative, and the third question in the affirmative.

So ordered.

MR. JUSTICE HOLMES, partially concurring:

If a man stacked his flax so near to a railroad that it obviously was likely to be set fire to by a well-managed train, I should say that he could not throw the loss upon the railroad by the oscillating result of an injury by the jury whether the road had used due care. I should say that, although of course he had a right to put his flax where he liked upon his own land, the liability of the railroad for a fire was absolutely conditioned upon the stacks being at a reasonably safe distance from the train. I take it that probably many, certainly some, rules of law based on less than universal considerations are made absolute and universal in order to limit those over-refined speculations that we all deprecate, especially where such rules are based upon or affect the continuous physical relations of material things. The right that is given to inflict various inconveniences upon neighboring lands by building or digging is given, I presume, because of the public interest in making improvement free, yet it generally is made absolute by the common law. It is not thought worth while to let the right to build or maintain a barn depend upon the speculations of a jury as to motives. A defect in the highway, declared a defect in the interest of the least competent travelers that can travel unattended without taking legal risks, or in the interest of the average man, I suppose to be a defect as to all. And as in this case the distinction between the inevitable and the negligent escape of sparks is one of the most refined in the world, I think that I must be right so far, as to the law in the case supposed.

A very important element in determining the right to recover is whether the plaintiff's flax was so near to the track as to be in danger from even a prudently managed engine. Here certainly, except in a clear case, we should call in the jury. I do not suppose that any one would call it prudent to stack flax within five feet of the engine, or imprudent to do it at a distance of half a mile, and it would not be absurd if the law ultimately should formulate an exact measure, as it has tended to in other instances. (*Martin v. District of Columbia*, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440); but at present I take it that if the question I suggest be material, we should let the jury decide whether 70 feet was too near by

ger and the danger which is remote and possible or probable only" "the difference is between realization and anticipation." This is only another way of saying that while the owner of property is not bound to provide against future negligence he can not shut his eyes to existing facts and it may also be suggested that in one case the property owner can not recover damages because of the restriction upon the use of his property through his fear of merely probable future negligence on the part of the defendant, nor could he recover the expenses of providing against it, while he can recover as part of his damages where the defendants' negligence has actually occurred, the cost, if any, to him in saving his property from the effect thereof.

the criterion that I have proposed. Therefore, while the majority answer the first question, No, on the ground that the railroad is liable upon the facts stated as matter of law, I should answer it Yes, with the proviso that it was to be answered No, in case the jury found that the flax, although near, was not near enough to the trains to endanger it if the engines were prudently managed, or else I should decline to answer the question because it fails to state the distance of the stacks.

CHAPTER II.

Contributory Negligence.

BUTTERFIELD *v.* FORRESTER.

Court of King's Bench, 1809. 11 East 60.

This was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, &c. At the trial before Bayley, J., at Derby, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the roadside at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at one hundred yards distance; and the witness who proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it; the plaintiff, however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence Bayley, J., directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant, which they accordingly did.

BAYLEY, J. The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

LORD ELLENBOROUGH, C. J. A party is not to cast himself upon an obstruction which had been made by the fault of another, and avail himself of it, if he did not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not author-

ize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

Rule refused.

PLUCKWELL v. WILSON.

Court of King's Bench, 1832. 5 Carrington & Payne, 375.

Action for an injury done to the plaintiff's chaise by a carriage of the defendant's, driven by his servant. There was contradictory evidence as to the cause of the injury, and also as to whether the defendant's carriage was in the centre, or on its proper side, of the road.

Mr. Justice Alderson left it to the jury to say whether the injury to the plaintiff's chaise was occasioned by negligence on the part of the defendant's servant, without *any* negligence on the part of the plaintiff himself; for that, if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict. Also, they would have to say, whether it was altogether an accident; in which case also the defendant would be entitled to the verdict. His Lordship also observed, that a person was not bound to keep on the ordinary side of the road; but that, if he did not do so, he was bound to use more care and diligence, and keep a better look-out, that he might avoid any concussion, than would be requisite if he were to confine himself to his proper side of the road.

Verdict for the plaintiff.

BOWEN, L. J., in *Thomas v. Quatermaine*, L. R. 18 Q. B. Div. 685 (1887), in distinguishing contributory negligence from voluntary assumption of risk, says, p. 697: "It" (the defense of contributory negligence) "rests on the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury.¹ It is for this reason that under the old form of pleading the defence of contributory negligence was raised, in actions based on negligence, under a plea of not guilty."

¹ See however, Pollock on Torts, 9th ed. 467-477 and an essay on "Contributory Negligence" by the editor, 21 Harv. L. R. 233 (1908), especially pp. 234 to 242. And see *Blenkinsop v. Ogden*, L. R. 1898, 1 Q. B. 783, in which the defendant unsuccessfully contended that the contributory negligence of a workman injured in using unguarded machinery would destroy the casual connection between the defendant's violation of the statute requiring the machinery to be fenced and so relieve them from liability to a fine thereunder.

LORD ESHER, M. R., in *Thomas v. Quatermaine*, L. R. 18 Q. B. Div. 685 (1887), p. 688:

"In an action for injuries arising from negligence it was always a defense that the plaintiff had failed to show that as between him and the defendant the injury had happened solely by the defendant's negligence. If the plaintiff by some negligence on his part directly contributed to the injury, it was caused by the joint negligence of both, and no longer solely by the negligence of the defendant, and that formed a defence to the action."

MOORE, J.,¹ in *Nieboer v. Detroit Electric Railway*, Supreme Court of Michigan, 1901, 128 Mich. 486:²

"The law by which it is determined whether or not the contributory negligence of the plaintiff bars recovery is very uncertain. The adjudicated cases are by no means harmonious, and there is an irreconcilable conflict between the principles announced by eminent judges and the text-book writers. It has been stated that the plaintiff can not recover if the injury complained of would not have occurred without his negligence. It has also been stated that plaintiff's negligence will not bar his recovery if due care on the part of the defendant would have prevented the injury. If the first statement is correct, contributory negligence never prevents recovery. The truth is that the first statement can be correctly applied only in cases of simultaneous negligence, as in the case of an injury to a person while crossing a railway in consequence of his and the railway company's negligence. The second statement can be correctly applied only in cases of successive negligence, as in the famous *Donkey Case*, of *Davies v. Mann*, 10 Mees. & W. 546, where defendant negligently ran into and injured the plaintiff's donkey, which plaintiff had negligently permitted to go unattended on the highway. The test almost universally approved is whether or not plaintiff's negligence is the proximate cause of his injury. If it is, he can not recover; if it is not, he can. Even this test has been criticised on the ground that the term 'proximate' is misleading. I think this criticism just and important. The word 'proximate' is ordinarily used to indicate the relation between defendant's negligence and the plaintiff's injury. As so used, it has not the same meaning that it has when used to indicate the relation between plaintiff's negligence and plaintiff's injury. To illustrate, suppose in the case of *Davies v. Mann*, above referred to, that, as a result of the collision between the cart

¹ Quoting Carpenter, J. who delivered the opinion in the Circuit Court.

² The plaintiff while riding on the bumper on the rear of an electric street car was injured by another car which ran into the car on which he was riding. The cars were running at two or three minute intervals and the plaintiff's car having come to a sudden stop, the following car was unable to stop in time to prevent the very slight collision in which the plaintiff was injured. The majority of the court reversed a judgment for the plaintiff, being of the opinion that the plaintiff was guilty of continuing negligence in voluntarily placing himself in a position of known danger and that the trial court should have directed a verdict for the defendant. Moore, J., with whom Montgomery C. J. concurred, dissented on the ground that while the plaintiff assumed the risk of falling or being thrown from the car, he was not negligent in taking such position and that if negligent, "had no such relation to his injury as had the negligence of the defendant."

and the donkey, a third person had been injured; I think all will agree that the owner of the donkey, as well as the owner of the cart, would have been liable. See *Lynch v. Nurdin*, 1 Q. B. (n. s.) 29. And we have already seen that the negligence of the owner of the donkey was not so related to the collision as to preclude recovery in a suit by him against the owner of the cart. As used in relation to contributory negligence, the term 'proximate' simply means that in some way the relation between plaintiff's negligence and his injury is more remote than that between defendant's negligence and the injury."²

OWEN, C. J., in *Davis v. Guarnieri*, Supreme Court of Ohio, 1887, 45 Ohio St. 470 (1887), p. 489:³

"The doctrine of contributory negligence is found upon these considerations: (1) The mutual wrong and negligence of the parties, and the reluctance of the law to attempt an apportionment of the wrong between them.⁴ (2) The principle which requires every suitor who seeks to enforce his rights or redress his wrongs, to go into the court with clean hands, and which will not permit him to recover for his own wrong. (3) The policy of making the personal interests of parties dependent upon their care and prudence."⁵

² See *Cordiner v. Los Angeles Traction Co. and Los Angeles R. Co.*, 5 Cal. App. 400 (1907), where the plaintiff having been injured in a collision between the vehicles of the two defendants, both negligently operated, the Railway Co. unsuccessfully contended that if the motorman of the Traction Co. could have stopped his car after seeing the Railway Company's car upon its tracks, the Traction Co. was alone liable to the plaintiff, and *Shield v. Johnson Co.*, 132 La. 773 (1913), a substantially similar case. In *Nashua Iron & Co. v. Worcester & N. R. Co.*, 62 N. H. 159 (1882), the court held that he, of two persons whose joint negligence had injured another, from whom the plaintiff had recovered damages, was entitled to indemnity from the other, if such other had had the last clear chance to prevent the accident, but see 21 Harv. L. R., pp. 242-243 and *Shield v. Johnson Co.*, 132 La. 773 (1913).

³ The court held that these considerations did not require that the plaintiff, poisoned by drugs carelessly put up by the defendant, should be barred by the contributory negligence of her husband in failing to discover the defendant's mistake. See the very similar language in *Bellfontaine & Indiana R. Co. v. Snyder*, 18 Ohio St. 399 (1868), holding that an infant plaintiff is not barred by the negligence of his parent or custodian.

⁴ "The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other, is, not that the wrong of the one is set-off against the wrong of the other; it is that the law can not measure how much of the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct."—Strong, J. in *Heil v. Glanding*, 42 Pa. 493 (1862), p. 499.

"It is an incontestable principle that where the injury complained of is the product of mutual or concurring negligence, no action for damages will lie. The parties being mutually in fault, there can be no apportionment of the damages. The law has no scales to determine in such cases whose wrongdoing weighed most in the compound that occasioned the mischief."—Woodward, J. in *Railroad v. Norton*, 24 Pa. 465 (1855), p. 469.

⁵ In *Railroad v. Norton* and *Heil v. Glanding*, *supra*, emphasis is laid on the necessity of keeping railroad tracks clear of obstruction from uses not legislatively authorized, as a reason for denying damages to one whose property, being on the tracks in the course of such use, is injured by the negligent operation of the railroad engines or of another, whose use of the track is equally unauthorized.

Benning, J. dissenting in *Macon & Western R. R. Co. v. Winn*, 26 Ga.

SECTION 1.

Negligence Contributing to an Injury as a Bar to Liability Arising Out of Other Than Merely Negligent Conduct.**(a) Conduct entailing liability not dependent on proof of negligence.**

MULLER v. M'KESSON et al.

Court of Appeals of New York, 1878. 73 N. Y. 195.

CHURCH, CH. J. The defendants had a chemical factory in Brooklyn and owned a ferocious dog of the Siberian bloodhound species, which was kept in the enclosed yard surrounding the factory, and generally kept fastened up in daytime and loosed at night as a protection against thieves. The plaintiff was in the employ of the defendants as a night watchman. It was his duty to open the gate to the yard every morning to admit the workmen, and to do this he would pass from the door of the factory across a corner of the yard to the gate. On the morning in question, as the plaintiff was returning from opening the gate, he was attacked from behind by the dog, thrown to the ground and severely bitten, and after freeing himself, and while endeavoring to reach the factory, was again attacked and bitten and seriously injured. Upon the close of the evidence and after a motion for a nonsuit had been denied, the judge decided that there was no question for the jury but the question of damages, to which there was an exception.

The points urged by the appellants in this case are: First,

250 (1858), after holding that the plaintiff's negligence did not bar an action, but that the damages recovered should bear such proportion to the loss sustained as the defendant's fault bore to the joint fault of both as the producing cause thereof: "If denying an action, in these cases, to the sufferer, is a proper punishment to him, it is an improper reward to the other party; if denying an action to the sufferer will be a discouragement to future negligence in him, it will be an encouragement to future negligence in the other party."

"The practice being thus established of depriving the plaintiff of all remedy, the ultimate justification of the rule is in reasons of policy, viz., the desire to prevent accidents by including each member of the community to act up to the standard of due care set by the law. If he does not, he is deprived of the assistance of the law. How much influence the rule exerts to accomplish the object aimed at can not be known. That it does exert some influence is sure. A plaintiff who has learned the law of contributory negligence by the hard experience of losing a verdict is likely to be more careful in the future. From his negligence, at least, accidents will be less likely to happen."—W. Schofield, Esq., *Contributory Negligence*, 3 Harv. L. R. 263 (1890), p. 270, quoted by Sir Frederick Pollock, *Law of Torts*, 9th ed. 473, as expressing "the element of truth which the penal theory presents in a distorted form."

That the plaintiff was guilty of contributory negligence, or at least the evidence would have warranted the jury in so finding.

The point as to contributory negligence presents the most difficulty. There are expressions in some of the cases indicating that the liability of the owner is not affected by the negligence of the person injured. In *Woolf v. Chalker* (31 Conn. 130) it is said that the owner is liable "irrespective of any questions of negligence of the plaintiff," and citing *May v. Burdett* (9 Ad. & El. (N. S.), 101) and *Card v. Case* (57 Eng. C. L. R., 622).

If a person with full knowledge of the evil propensities of an animal wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it can not be said, in a legal sense, that the keeping of the animal, which is the *gravamen* of the offense, producing the injury. (*Cogswell v. Baldwin*, 15 Vt., 404; *Koney v. Ward*, 36 How. P. R., 255; *Wheeler v. Brant*, 23 Barb., 234; *Blackman v. Simmons*, 3 Car. & P., 138; *Brock v. Copeland*, 1 Esp., 203; *Bird v. Holbrook*, 4 Bing., 628.) But as the owner is held to a vigorous rule of liability on account of the danger to human life and limb, by harboring and keeping such animals, it follows that he ought not to be relieved from it by slight negligence or want of ordinary care. To enable an owner of such an animal to interpose this defense, acts should be proved with notice of the character of the animal, which would establish that the person injured voluntarily brought the calamity upon himself. It is sufficient to say that the evidence did not show that the plaintiff had notice that the dog was loose, nor were the circumstances such as to induce him to believe that such was the fact. If the negligence of the plaintiff is to prevail, it must be predicated upon not taking the precaution to look, examine, and ascertain whether the dog was fastened or not. The plaintiff might have ascertained by examination whether the dog was fastened in his kennel or not; but I do not think he was bound to exercise that degree of care, or that the defendant can be relieved from liability because he did not.

As negligence, in the ordinary sense, is not the ground of liability, so contributory negligence, in its ordinary meaning, is not a defense.¹

(b) Conduct intentionally injurious.

STEINMETZ v. KELLY.

Supreme Court of Indiana, 1880. 72 Ind. 442.

WORDEN, J. Action by the appellee against the appellant for assault and battery. The complaint consisted of three paragraphs,

¹ *Accord: Brooks v. Taylor*, 65 Mich. 208 (1887); *Fake v. Addicks*, 45 Minn. 37 (1890); and see *Kelly v. Killourey* and *Peck v. Williams*, note to *Schutt v. Adair*, *post*, p. 1375.

a demurrer to each of which, for want of sufficient facts, was overruled. The first, the only one to which any specific objection is made in this Court, alleged that the defendant, on, &c., "violently and unlawfully assaulted the plaintiff, and struck him, and also threw him, the plaintiff, from the house of the defendant on to the street pavement, in front of the defendant's house, with great violence, fracturing," &c.

The defendant asked that the following interrogatory be answered by the jury, if they should return a general verdict, viz.: "Did the fault or negligence of the plaintiff contribute in any way to the injury of the plaintiff, received on the evening of the 3d of March, 1876?" The Court declined to direct the jury to answer the interrogatory, and in this way we think no error was committed.

The right of the plaintiff to recover depended not upon any negligence of the defendant, but upon the assault and battery, which, if perpetrated at all by the defendant, was intentional and purposed. It may be that the defendant did not intend to inflict so severe an injury upon the plaintiff as seemed to result from the excess of force applied to him; but it does not therefore follow that he did not intend to apply that force.

The doctrine that contributory negligence on the part of the plaintiff will defeat his action has been generally applied in actions based on the negligence of the defendant, in short, in cases involving mutual negligence. But it has also been applied in some cases where the matter complained of was not negligent merely, but the commission of some act in itself unlawful, without reference to the manner of committing it, as the wilful and unauthorized obstruction of a highway, whereby a person is injured. *Butterfield v. Forrester*, 11 East, 60; *Dyert v. Schenk*, 23 Wend. 446.

The doctrine, however, can have no application to the case of an intentional and unlawful assault and battery, for the reason that the person thus assaulted is under no obligation to exercise any care to avoid the same by retreating or otherwise, and for the further reason that his want of care can in no just sense be said to contribute to the injury inflicted upon him by such assault and battery.

An intentional and unlawful assault and battery inflicted upon a person is an invasion of his right of personal security, for which the law gives him redress, and of this redress he can not be deprived on the ground that he was negligent and took no care to avoid such invasion of his right.

The trespass was purposely committed by the defendant. If he could excuse it on the ground of the alleged misconduct of the plaintiff, and if he employed no more force than was necessary and reasonable, that was a complete defence. Otherwise the plaintiff, if he made out the trespass, was entitled to recover, and no negligence on his part, as before observed, could defeat his action. The case of *Ruter v. Foy*, 46 Iowa, 132, is in point. There the plaintiff alleged that the defendant had assaulted and beat her with a pitchfork. On the trial the defendant asked, but the Court refused, the following instruction: "If you find from the evidence that the plaintiff

was injured, or contributed to her injury, by her own act or negligence, defendant would not be liable for assault and battery upon her, and plaintiff can not recover." On appeal the Court said upon this point: "The doctrine of contributory negligence has no application in an action for assault and battery."

The case here is entirely unlike that of *Brown v. Kendall*, 6 Cush. 292. * * *

The difference between that case and the present is substantial and vital. In that case the battery was unintentional, and the defendant therein was guilty of no wrong save his negligence. Here the defendant intentionally perpetrated the battery, and the plaintiff's right to recover was not based upon the negligence of the defendant at all.

Judgment affirmed.¹

(c) Wilful, wanton and reckless misconduct.

START, C. J. in *Alger, Smith & Co. v. Duluth-Superior Traction Co.*

Supreme Court of Minnesota, 1904. 93 Minn. 314.

"There is a well-defined distinction between ordinary negligence and wilful or wanton negligence. Ordinary negligence is not actionable if the negligence of the injured party directly contributed to the result, but liability is incurred by wilful negligence irrespective of such contributory negligence. Wilful negligence is not simply greater negligence than that of the injured party, nor does it necessarily include the element of malice or an actual intent to injure another. But it is a reckless disregard of the safety of the person or property of another by failing, after discovering the peril, to exercise ordinary care to prevent the impending injury. *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 450, 74 N. W. 166; *Slo-niker v. Great Northern Ry. Co.*, 76 Minn. 306, 79 N. W. 168; *Lando v. Chicago, St. P. M. & O. Ry. Co.*, 81 Minn. 279, 83 N. W. 1089; *Olson v. Northern Pac. Ry. Co.*, 84 Minn. 258, 87 N. W. 843; *Rawitzer v. St. Paul City Ry. Co.*, *supra*, page 84."¹

¹ Accord: *Birmingham R., Light & Power Co. v. Jones*, 146 Ala. 277 (1906); *Louisville N. A. & C. R. Co. v. Wurl*, 62 Ill. App. 381 (1896); *Cleveland C. C. & St. L. R. Co. v. Miller*, 149 Ind. 490 (1898); *Brendle v. Spencer*, 125 N. Car. 474 (1899); see also, *Berge v. Gardner*, 19 Conn. 507 (1849), *semble*; *Florida So. R. Co. v. Hirst*, 30 Fla. 1 (1892), *semble*; *Labarge v. Pere Marquette R. Co.*, 134 Mich. 139 (1903), *semble*, and *Wynn v. Allard*, 5 Watts & S. 524 (Pa. 1843).

² Accord: *Wabash R. Co. v. Speer*, 156 Ill. 244 (1895), *Schumacher v. St. Louis & S. F. R. Co.*, 39 Fed. 174 (1889) and cases cited in note 2 to *Cavanaugh v. Boston & M. R. Co.*, *post*, p. 1400, and see the language of Holmes, J. in *Pierce v. Cunard S. S. Co.*, 153 Mass. 87 (1891). In many of the cases the defendant's conduct showed a real conscious indifference to the safety of the plaintiff or his property, *Pierce v. Cunard S. S. Co.*, 153 Mass. 87 (1891);

COLEMAN, J., in *Birmingham Railway & Electric Company v. Bowers*:

Supreme Court of Alabama, 1895. 110 Ala. 328.

"Mere negligence which gives a cause of action is the doing of an act, or the omission to act, which results in damage, but without intent to do wrong or cause damage. To constitute a wilful injury, there must be design, purpose, intent to do wrong and inflict the injury. Then there is that reckless indifference or disregard of the natural or probable consequence of doing an act, or omission of an act, designated, whether accurately or not, in our decisions, as 'wanton negligence,' to which is imputed the same degree of culpability and held to be equivalent to wilful injury. A purpose or intent to injure is not an ingredient of wanton negligence. Where either of those exist, if damage ensues, the injury is wilful. In wanton negligence, the party doing the act or failing to act, is conscious of his conduct, and without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury.¹ A mere error of judgment as to the result of doing an act or the omission of an act, having no evil purpose or intent, or consciousness of probable injury, may constitute simple negligence,

Indianapolis B. & W. R. Co. v. McBrown, 46 Ind. 229 (1874). In other cases no such conscious indifference was exhibited.

Where the plaintiff's negligence is subsequent to the defendant's so-called reckless or wanton negligence, as where by the mere use of senses he could discover his peril and avoid the injury, many cases hold that such negligence bars liability, *Sego v. So. Pac. R. Co.*, 137 Cal. 405 (1902); *Olson v. N. P. R. Co.*, 84 Minn. 258 (1901); *Rawitzer v. St. Paul City R. Co.*, 93 Minn. 84 (1904); *Labarge v. Pere Marquette R. Co.*, 134 Mich. 139; *Penna. R. Co. v. McGirr*, 61 Md. 108 (1883); *Texas & N. O. R. Co. v. Brown*, 2 Tex. Civ. App. 281 (1893), 21 S. W. 424, and see Knowlton, J. in *Aiken v. Holyoke R. Co.*, note 2 to *Pinoza v. Northern Chair Co.*, post, p. 1377, contra, *Central of Ga. R. Co. v. Partridge*, 136 Ala. 587 (1902).

¹ See McClellan, J. in *Ga. Pac. R. Co. v. Lee*, 92 Ala. 262 (1890), p. 270, such conduct "is, strictly speaking, not negligence at all, though the term 'gross negligence' has been * * * frequently used in defining it. * * * It is more than any degree of negligence, inattention or inadvertence—which can never mean other than the omission of action without intent, existing or imputed, to commit wrong—it is that recklessness or wantonness, or worse, which implies a willingness to inflict the impending injury, or a wilfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent to perpetrate wrong." See also, *Mitchell, J. in Louisville, New Albany & Chicago R. Co. v. Bryan*, 107 Ind. 51 (1886); and compare *Wynn v. Allard*, 5 W. & S. 524 (Pa. 1843), where the court held that if the plaintiff, who was walking in the driveway, was negligent in not keeping a lookout for vehicles, "the defendant would be answerable only for negligence so wanton and gross as to be evidence of voluntary injury," with the statements of Marshall, J. in *Astin v. Chicago M. & St. P. R. Co.*, 143 Wis. 477 (1910), p. 484, to the effect that wanton negligence requires an advertent act or omission "evinced intention to produce" the injury or done or omitted "with disregard of consequences as to evince little short of actual intent," *Bolin v. Chicago St. P., M. & O. R. Co.*, 108 Wis. 333 (1900), p. 347, and Knowlton, C. J. in *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269 (1903), "if one is grossly and wantonly reckless in exposing others to danger, (the law) holds him to have intended the natural consequences."

but can not rise to the degree of wanton negligence or wilful wrong."²

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO. v.
BAKER.

Supreme Court of Kansas, 1908. 79 Kans. 183.

MASON, J. Sarah E. Baker was killed by a train of the Atchison, Topeka & Santa Fe Railway Company in a street of Olathe. An administrator recovered a judgment on this account, from which the company prosecutes error. The special findings, supplemented by the general verdict, may be deemed to have established these facts:

Mrs. Baker was 71 years old. Her home was in the middle of a block facing east upon a street sixty feet wide, along which ran two railroad tracks about twelve feet apart, equidistant from the middle of the street, the space between them being filled in with cinders and in common use by foot travelers. Most persons going along the street on foot, especially when it was muddy, used this ballasted portion. There was no sidewalk upon the side of the street where Mrs. Baker lived. About three o'clock in the afternoon of the day of her death she left her house, crossed the planks over the ditch, and was struck and killed by a north-bound freight train running on the nearer track at the rate of fifteen miles an hour, neither the bell nor the whistle having been sounded after the engine passed the depot. The train did not stop at the depot, but went through the town, in accordance with custom, with steam cut off, the grade permitting this. Every point on the track taken by the deceased from her fence to the track commanded an uninterrupted view of the track to the south for a distance of three-quarters of a mile. The engineer and fireman could have seen Mrs. Baker at the place where she was killed if they had been on the lookout, but not having kept a careful watch ahead of the engine they did not see her at all. A city ordinance limited the speed of trains to six miles an hour.

But the jury did not find that the accident was due to the reckless and wanton misconduct of the employees in charge of the engine, and this finding, if it stands, renders the matter of contributory negligence immaterial. With regard to this the railroad company makes two contentions: (1) That the evidence did not justify submitting to the jury the question of recklessness and wantonness, and (2) that, if so, there was error in the instructions on the subject.

As the employees did not see Mrs. Baker, such recklessness

² *Accord: Willis v. Boston & N. St. R. Co.*, 208 Mass. 589 (1911); *Brannen v. Kokomo G. & J. Gravel Road Co.*, 115 Ind. 115 (1888), toll-gate keeper closed gate in front of plaintiff's horses, supposing he was intending to pass without paying toll, held that the company was liable only if the circumstance clearly indicated that it was highly probable that the horses would run against it.

and wantonness on their part as to render the company liable notwithstanding her contributory negligence can only be attributed to them upon the theory that to their knowledge the public street near the place of the accident was in such general use that they must be deemed to have understood that foot-travelers were likely to be there, and understanding this to have chosen to omit all warning of the approach of the engine, not necessarily because they affirmatively desired to kill or maim any one, but because they were entirely indifferent whether they did so or not. The running of a train at an excessive speed along or across a busy street of a populous city, without either outlook or signal, may well be held to exhibit such contempt for the rights of others as to supply the place of positive malice. Thus, in *Ga. Pacific Railway Co. v. Lee*, 92 Ala. 262, 9 South. 230, it was said:

"To run a train at a high rate of speed, and without signals of approach, at a point where the trainmen have reason to believe there are persons in exposed positions on the track, as over an unguarded crossing in a populous district of a city, or where the public are wont to pass on the track with such frequency and in such numbers—facts known to those in charge of the train—as that they will be held to a knowledge of the probable consequences of maintaining great speed without warnings, so as to impute to them reckless indifference in respect thereto, would render their employer liable for injuries resulting therefrom, notwithstanding there was negligence on the part of those injured, and no fault on the part of the servants after seeing the danger. The doctrine is not based on the idea that they ought to have sooner observed the danger, however, but on the ground that they knew of its existence—of the presence of people in positions of peril, as a matter of fact, without seeing them at all in the particular instance."¹ (Page 271).

The conduct of the employees in charge of an engine in failing to take measures for the protection of a person upon the track can be characterized as "wanton," in the sense in which that word is used in this connection, only when they actually know of his presence, or when the situation is substantially the same as though they had such knowledge—when such knowledge may fairly be imputed to them. It is not enough for that purpose that the exercise of ordinary diligence would have advised them of the fact, for their

¹ This McClellan, J. calls "a shading" of the doctrine previously considered, viz.: that it is "recklessness, wantonness, or worse" not to resort to all reasonable effort to prevent disaster, after the plaintiff's peril "has become known to the defendants as a fact, and not merely after they should have known it." In *Ga. Pac. R. Co. v. Lee*, the court held that there was no evidence to show that the crossing was "a crowded thoroughfare," "at most it was the crossing of a considerably travelled public road over the railway and there was nothing in the situation * * * assuming that it was well known to the trainmen, to justify the imputation to them of a consciousness that a natural or a probable result of their conduct would be the infliction of injury to persons or property at that point. We apprehend that the maintenance of even a high rate of speed, and omission to give signals, in approaching such a crossing can be no more than negligence, in an action counting on which contributory negligence would be a good defense."

omission of duty in that regard amounts only to negligence. Nor is it enough that they know some one might be in the place of danger; the probability must be so great—its obviousness to the employees so insistent—that they must be deemed to realize the likelihood that a catastrophe is imminent and yet to omit reasonable effort to prevent it because indifferent to the consequences. The evidence here falls short of that in the cases from which the foregoing quotations are made only in the size of the city and the amount of travel over its streets, the difference being one of degree.² It affords a relatively slight basis for imputing to the engineer or fireman what amounts almost to a knowledge of the decedent's danger, but we conclude that it was sufficient to entitle the plaintiff to go to the jury on this issue.

The fact that the evidence tending to charge the engineer and fireman with knowledge that there was likely to be some one on the track at the place of the accident was so meager makes it especially important to consider carefully whether the jury are fully advised of the degree of turpitude the verdict attributed to these employees. The instructions, after stating that contributory negligence would not defeat a recovery if the negligence of the agents of the defendant was wanton and reckless, defined these terms as follows:

"Recklessness is an indifference, whether wrong is done or not, an indifference to the rights of others. Wanton negligence is the failure of one charged with a duty to exercise an honest effort in the employment of all reasonable means to prevent a serious injury."

If it had been established that the engineer or fireman saw Mrs. Baker on or near the track these definitions might have been sufficient, for their language would be understood as used with reference to that situation. But as the jury found this fact not to exist it was necessary that they should be told what other conditions would replace that of actual knowledge. This information was not given them in any part of the charge.

The duty referred to, the disregard of which amounts to wantonness, is manifestly that which arises only when the person charged with dereliction has knowledge of the danger or of the facts which impute that knowledge to him. On account of the omission of the instructions to cover this feature of the matter a new trial will be ordered. The effect of the omission was intensified by employing the term "gross negligence" in one part of the charge as the equivalent of "wanton recklessness," and in another defining it as the want of slight care. Although what is really reckless and wanton misconduct is sometimes spoken of as gross negligence, the expression is everywhere recognized as inaccurate and unfortunate, because it seems to imply a difference only of degree, whereas the whole doctrine that contributory negligence is no defense where the injury

² Compare *Ga. Pac. R. Co. v. Lee*, *supra*, with *Memphis R. Co. v. Martin*, 117 Ala. 367 (1897).

is the result of recklessness and wantonness is based upon the theory of a difference in kind.³ For the same reason the phrase "reckless and wanton negligence" has a misleading tendency. One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence; his conduct must be such as to put him in the class with the wilful doer of wrong.⁴ The only respect in which this attitude is less blameworthy than that of the intentional wrong-doer is that instead of affirmatively wishing to injure another he is merely willing to do so. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not.

The judgment is reversed and a new trial ordered.⁵

(d) The Admiralty rule of divided damages.

CAYZER, IRVINE & CO. v. CARRON CO.

House of Lords, 1884. L. R. 1883-84, 9 Appeal Cases, 873.

LORD BLACKBURN. When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rule of Admiralty and the rule of Common Law. The rule of Common Law says, as each occasioned the accident neither shall recover at all, and it shall be just like an inevitable accident; the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss it shall be brought into a hotchpotch and divided between the two. Until the case of

³ See *Banks v. Braman*, 188 Mass. 367 (1905), and amended head-note thereto in 192 Mass. 162; and see *Lanci v. Boston El. R. Co.*, 197 Mass. 32 (1907).

⁴ His conduct is often spoken of as "criminal or quasi criminal", Knowlton, C. J., in *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269 (1903), Mitchell, J., in *Louisville, N. A. & C. R. Co. v. Bryan*, 107 Ind. 51 (1886).

⁵ Accord: *Lacey v. Louisville & N. P. R. Co.*, 152 Fed. 134 (1907); *Schindler v. Milwaukee, L. S. & W. R. Co.*, 87 Mich. 400 (1891), and *Birmingham So. R. Co. v. Powell*, 136 Ala. 232 (1902), flying switch without any one on cars to keep lookout and control them; *Memphis & C. R. Co. v. Martin*, 117 Ala. 367 (1897), *Lake Shore etc. R. Co. v. Bodener*, 139 Ill. 596 (1892), and *Neary v. Northern Pac. R. Co.*, 37 Mont. 461 (1906), trains run at high, in some cases illegal, speed without proper signals over frequented crossings or through city streets; *Cooper v. Lake Shore & Michigan So. R. Co.*, 66 Mich. 261 (1887), and *Labarge v. Pere Marquette R. Co.*, 134 Mich. 139 (1903), train backed without lookout being kept at the crossing; *Mapes v. Union R. Co.*, 56 App. Div. 508 (N. Y. 1900), trolley car running at high speed with motorman asleep at his post. Contra: *Louisville, N. A. & C. R. Co. v. Schmidt*, 106 Ind. 73 (1885), and *Louisville, N. A. & C. R. Co. v. Bryan*, 107 Ind. 51 (1886), facts similar to *Lacey's case*; *Brooks v. Pittsburgh, C. C. & St. L. R. Co.*, 158 Ind. 62 (1901), and *Brown v. Chicago & N. W. R. Co.*, 109 Wis. 384 (1901), facts similar to *Memphis R. Co. v. Martin*; *Baker v. Tacoma E. R. Co.*, 44 Wash. 575 (1906), facts similar to *Cooper's case*.

Hay v. Le Neve, 2 Shaw, Sc. App. 395, which has been referred to in the argument, there was a question in the Admiralty Court whether you were not to apportion it according to the degree in which they were to blame; but now it is, I think, quite settled, and there is no dispute about it, that the rule of the Admiralty is, that if there is blame causing the accident on both sides they are to divide the loss equally, just as the rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls.¹

(e) Comparative negligence.

BREESE, J., in *Galena & Chicago Union Railroad Company v. Jacobs*, Supreme Court of Illinois, 1858, 20 Ill. 478, 496:

"It will be seen, from these (English and American) cases, that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care, as manifested by both parties; for all care or negligence is at best but relative, the absence of the highest possible degree of care showing

¹ *Accord: The "North Star,"* 106 U. S. 17 (1882); see also case cited in the opinion of Blatchford, J., in the *Max Morris*, *infra*.

This is not confined to cases of collision or other injuries to shipping. One, receiving personal injuries, through the negligent operation or defective condition of a ship or wharf is not barred by his contributory fault but may recover divided damages, *Max Morris*, 137 U. S. 1 (1890), but the court in that case refused to decide whether in such case the damages should be equally divided or whether it should be in the discretion of the court to award a greater or less proportion thereof. While on the whole the tendency of the admiralty courts in the United States is towards an equal division of the damage, both in case of collision and of personal injuries, *The C. R. Hoyt*, 136 Fed. 671 (1905); *The Moran*, 143 Fed. 187 (1906); there are decisions and dicta to the effect that the damages should be awarded in proportion to the respective faults of such parties, as in France, Germany and certain other European countries, *The Mary Ida*, 20 Fed. 741 (1884); *The Victory*, 68 Fed. 395 (1895), where the question actually dealt with was the respective amounts which two negligent ships should pay to an owner of the cargo, himself in no fault; *The Lackawanna*, 151 Fed. 499 (1907), one-third damages allowed; *William Johnson Co. v. Johansen*, 86 Fed. 886 (1898), in which the court, however, held that the negligence of the libellant and the ship being equal, that the libellant should recover one-half of the damages sustained by an injury to his person. See for a synopsis of the various rules in force in the various maritime nations, Leslie F. Scott, Esq., "Collisions at Sea," etc., 13 Law Quarterly Rev. 17 (1897), especially pp. 17 and 18, and Lyon-Caen & Renault, *Traité de Droit Commercial*, 3rd ed., 1902, Vol. VI, § 1011.

The admiralty rule is equally applicable to determine the shares which two ships must pay in compensation for the injury received by a libellant innocent of contributory fault, *The Victory*, 68 Fed. 395 (1895).

The principle that a plaintiff whose negligence contributed to his harm could still recover but that his damages should be diminished in proportion to the share which his own fault had in producing his injury, was announced in *Macon & W. R. Co. v. Winn*, 26 Ga. 250 (1858), by Benning, J., and the subsequent Georgia Codes, 1882, sec. 3034, code 1895, sec. 2322, code 1911, sec. 2781, enacts this rule in actions to recover against railroads for injuries

the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that in proportion to the negligence of the defendant, should be measured the degree of care required of the plaintiff,—that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover.”

“We say, then, that in this, as in all like cases, the degree of negligence must be measured and considered, and wherever it shall appear that the plaintiff’s negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action.”

MAGRUDER, J., in *Lanark v. Dougherty*, Supreme Court of Illinois, 1894, 153 Ill. 163, 165:

“It is said, of two of these instructions, that they ignore the rule of comparative negligence. The doctrine of comparative negligence is no longer the law of this court. The instructions in the present case require the jury to find that the plaintiff was exercising ordinary care, and that the defendant was guilty of such negligence as produced the injury. This was sufficient, without calling the attention of the jury to any nice distinctions between degrees of care or of negligence.”

SECTION 2.

Contributory Negligence as a Bar to Liability for the Breach of Statutory Duty.

SCHUTT v. ADAIR.

Supreme Court of Minnesota, 1906. 99 Minn. 7.

BROWN, J. One of the defenses interposed at the trial was that plaintiff was guilty of contributory negligence, which the jury by their verdict sustained. Upon this subject the court charged the jury as follows:

The jury are instructed that it was the duty of the plaintiff on his second visit to defendants’ warehouse on the day of the

to persons or property, see *Alabama G. S. R. Co. v. Coggins*, 88 Fed. 455 (1898); while in sec. 29972, code 1898, sec. 3830, code of 1895, sec. 4426, code of 1911, it is provided that “if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendants’ negligence he is not entitled to recover; but in other cases the defendant is not relieved though the plaintiff may in some way have contributed to the injury sustained.” Some of the recent statutes dealing with employers’ liability and workmen’s compensation contain somewhat similar provisions to the effect that the contributory negligence of the plaintiff shall not operate as a bar to recovery but shall be considered by the jury as reducing the damages to be awarded. United States, Act of Congress, April 22, 1908, Ch. 149, sec. 3, 25th Statute at Large, p. 65; Kansas, Act of March 14, 1911, § 46; Texas, Act of April 16, 1913, § 1.

accident to exercise such care and diligence in looking and examining the place where he went as would be expected of an ordinarily prudent man situated as plaintiff was, and having such knowledge of the elevator as plaintiff had, and that if plaintiff failed to exercise such care and diligence he was guilty of contributory negligence, and can not recover.

It is insisted that this instruction was erroneous, *inter alia*, in stating as a matter of law that a duty devolved upon plaintiff while within the warehouse to exercise due care for his own safety. Though the violation of a statutory duty may constitute negligence per se and actionable if injury result therefrom, nevertheless, statutes imposing such duties are not so construed as to abrogate the ordinary rules of contributory negligence, unless so worded as to leave no doubt that the legislature intended to exclude the defense. 20 Am. & Eng. Enc. (2d Ed.) 159; *Caswell v. Worth*, 5 El. & Bl. 849; *Hayes v. Michigan Central R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *Whitcomb v. Standard*, 153 Ind. 513, 55 N. E. 440; *Queen v. Dayton*, 95 Tenn. 458, 465, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. 935; *Holum v. Chicago*, 80 Wis. 299, 50 N. W. 99; *Taylor v. Carew*, 143 Mass. 470, 10 N. E. 308.

It was not the intention of the legislature in enacting this statute to create an absolute liability, but rather to impose a duty upon persons operating warehouses and manufacturing establishments to guard and protect their employees from injury, the non-compliance with which constitutes negligence justifying a recovery by an injured servant, without further proof of a failure to exercise that degree of care enjoined by the rules of the common law. The general principles of the law underlying the right of action for personal injuries founded upon negligence remain the same, though the proof of negligence is simplified by showing merely a failure to obey the statutory commands. Contributory negligence will bar such an action precisely as it bars such an action at common law. *Anderson v. C. N. Nelson Lumber Co.*, 67 Minn. 79, 69 N. W. 630; *Swenson v. Osgood & Blodgett Mfg. Co.*, 91 Minn. 509, 98 N. W. 645.¹

¹ So where a statute requires the instalation of safety appliances, while the weight of modern authority is to the effect that an employer does not assume the risk of injury from his employees' disobedience thereof, see *Narramore v. Cleveland, C. C. & St. L. R. Co.*, 96 Fed. 298, *post*, *Appendix*, he is usually held to be barred by his contributory negligence, Taft, J. in *Narramore v. Railroad* and cases therein cited by him, and *Keenan v. Edison Electric Illuminating Co.*, 159 Mass. 379 (1893). In Illinois in an action for the wilful violation of the duty to protect miners by fencing shafts, etc., created by statutes carrying into effect the constitutional provision, § 29, Art. 4, contributory negligence is no defense, *Carterville Coal Co. v. Abbot*, 181 Ill. 495 (1899), with which compare *Browne v. Siegel-Cooper Co.*, 191 Ill. 226 (1901), holding that the negligence of an employee barred recovery when he fell into an unguarded elevator shaft required to have iron doors under a general ordinance regulating the use of all elevators for the protection of the public generally. The tendency of more recent cases is to require a much less amount of self-protective precaution from employees using or coming into necessary contact with appliances lacking statutory guards, compare *Schlemmer v. Buffalo, R. & P. R. Co.*, 207 Pa. 198 (1903) with *Fegley v. Lycoming Rubber Co.*, 231 Pa. St. 446 (1911).

LENAHAN v. PITTSTON COAL CO.

Supreme Court of Pennsylvania, 1907. 218 Pa. St. 311.

MR. JUSTICE ELKIN. The Act of June 2, 1891, P. L. 176, which, as its title declares, was intended to protect the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and to preserve the property connected therewith, provides, section eight, that "no person under fifteen years of age shall be appointed to oil the machinery and no person shall oil dangerous parts of such machinery while it is in motion." The boy, Munley, was fourteen years, four months and three days old at the time the accident occurred. At the trial the learned court below directed a compulsory nonsuit to be entered, which, on motion made, he refused to take off on the ground that the boy was guilty of contributory negligence in attempting to oil dangerous parts of the machinery while in motion, which was in violation of the statute, and therefore negligent. This would be the correct rule if the injured boy had the right under the law to engage in the employment which occasioned the injury. The learned trial judge took the view that the boy being over fourteen years of age was presumed under the common-law rule to have sufficient capacity to be sensible of danger and to have the power to avoid it, and that such presumption had not been overcome by the evidence produced at the trial. The exact question raised by this appeal is whether this common-law rule was modified or changed by the statutory regulation. The injured boy was under fifteen years of age, and if the appellee company employed him for the purpose of oiling machinery it did so in violation of the statute. Is it, therefore, in position to set up in this case the rule which presumes a boy over fourteen to be capable of appreciating danger so as to apply the rule of contributory negligence to his acts, when the legislature in express terms provided that an employer shall not engage a person under the age of fifteen years to perform this dangerous work? After full consideration we are unanimously of the opinion that the legislature, under its police power, could fix an age limit below which boys should not be employed, and when the age limit was so fixed, an employer who violates the act by engaging a boy under the statutory age does so at his own risk, and if the boy is injured while engaged in the performance of the prohibited duties for which he was employed, his employer will be liable in damages for injuries thus sustained. This rule is founded on the principles that when the legislature definitely established an age limit under which children should not be employed, as it had the power to do, the intention was to declare that a child so employed, did not have the mature judgment, experience

As to the effect of the contributory negligence of a plaintiff bitten by a dog, when by statute the person keeping it is liable without notice of its ferocious character, compare *Quimby v. Woodbury*, 63 N. H. 370 (1885), with *Hussey v. King*, 83 Maine 568 (1891), *Schultz v. Griffith*, 103 Iowa 150 (1897), *Kelley v. Killourey*, 81 Conn. 320 (1908), and *Peck v. Williams*, 24 R. I. 583 (1903).

and discretion necessary to engage in that dangerous kind of work. A boy employed in violation of the statute is not chargeable with contributory negligence or with having assumed the risks of employment in such occupation. There can be no question that this statute was intended as a protection to the employees, and its object was to prevent children under the age of fifteen years from being employed in and around the anthracite coal mines in the dangerous kind of work designated in the act, and it should be given a construction to best effectuate the purpose of its enactment. This exact question has not been before our courts, but it has been passed upon by the courts of many other jurisdictions, and so far as we are informed the rule hereinbefore stated has been uniformly followed.

Judgment reversed and a venire facias de novo awarded.¹

PINOZA v. NORTHERN CHAIR COMPANY.

Supreme Court of Wisconsin, 1913. 152 Wis. 473.

MARSHALL, J. The statute claimed to have been violated is as follows:

"No child under the age of sixteen years shall be employed in adjusting any belt or in oiling or assisting in oiling, wiping or cleaning any machinery when the same is in motion or in operating or assisting in operating any circular or bandsaw, wood shaper, wood jointer, planer, sandpaper or wood polishing machine * * * or in any other employment dangerous to life or limb * * *" Sec. 1728a, Stats. (Laws of 1909, ch. 338).

Any one "who" shall violate "any of the provisions of this act" shall be deemed guilty of a misdemeanor, and upon conviction there-

¹ *Accord: American Car etc. Co. v. Armentraut*, 214 Ill. 509 (1905); *Strafford v. Republic Iron etc. Co.*, 238 Ill. 371 (1909); *Inland Steel Co. v. Yedinak*, 172 Ind. 423 (1909); *Marino v. Lehmaier*, 173 N. Y. 530 (1903), but see *Rahn v. Standard Optical Co.*, 110 App. Div. 501 (N. Y. 1906); *Glucina v. Goss Brick Co.*, 63 Wash. 401 (1911); *Stehle v. Jaeger Automatic Machine Co.*, 220 Pa. St. 617 (1908), 225 Pa. St. 348 (1909), where plaintiff was held entitled to recover though injured while dealing with a machine outside his appointed field of duty and which he had been forbidden to touch. In *Nairn v. National Biscuit Co.*, 120 Mo. App. 144 (1906), it is held that mere heedless inadvertence is no defense. On the other hand it is held in many cases that, if the child is in fact capable of appreciating the danger of his act he may not recover, *Darsan v. Kohlmann*, 123 La. 164 (1909); *Berdos v. Tremont etc. Mills*, 209 Mass. 489 (1911); *Perry v. Tozer*, 90 Minn. 431 (1903); *Sterling v. Union Carbide Co.*, 142 Mich. 284 (1905); *Rahn v. Standard Co.*, *supra*, while it is held in *Bromberg v. Evans Laundry Co.*, 134 Iowa 38 (1907), that in view of the legislative declaration of such minor's incompetence, the burden of proving capacity lay on defendant. In *Norman v. Virginia-Pocahontas Coal Co.*, 68 W. Va. 405 (1910), the court held, though with a strong dissent, that the defendant engaging boys under legal age is liable for all injuries made reasonably probable by their youthful heedlessness, etc., but not for injuries caused by acts which they in fact know are dangerous; see for a somewhat similar idea *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458 (1895), and *Iron & Wire Co. v. Green*, 108 Tenn. 161 (1901).

of shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense," or be imprisoned "in the county jail not longer than thirty days." Sec. 1728h, Stats. (Laws of 1909, ch. 338).

It must be conceded that defendant acted in defiance of the written law in employing plaintiff and that if such circumstances rendered the defense of contributory negligence unavailing, as the trial court decided, the judgment must be affirmed.

The contention that contributory negligence has, uniformly, been held by this court to be a defense in an action based on negligence, and therefore the decision below is wrong, is beside the case. It fails to appreciate that there can be no contributory negligence, strictly so called, except in cases of concurrent inadvertence, denominated ordinary negligence or want of ordinary care. *Bolin v. C., St. P., M. & O. R. Co.*, 108 Wis. 333, 84 N. W. 446; *Haverlund v. C., St. P., M. & R. Co.*, 143 Wis. 415, 128 N. W. 273; *Astin v. C., M. & St. P. R. Co.*, 143 Wis. 477, 128 N. W. 265. There must be inadvertence of the defendant or there can be no contributory negligence of the plaintiff. Where the fault of the person causing the injury is characterized by advertence, denominated in our system, gross negligence,—wrong having the element of actual intent to injure or such disregard of consequences as to be equivalent thereto,¹ and so, called constructive intent,²—the contributory fault

¹ Knowlton, C. J. in *Banks v. Braman*, 188 Mass. 367-369, "The difference in culpability of the defendant, which distinguishes these different kinds of liability," (for ordinary negligence and wanton negligence) "is something more than a mere difference in the degree of inadvertence. In one case there need be nothing more than a lack of ordinary care, which causes an injury to another. In the other case there is wilful, intentional conduct whose tendency to injure is known, or ought to be known, accompanied by a wanton and reckless disregard of the probable harmful consequences from which others are likely to suffer, so that the whole conduct together, is of the nature of a wilful, intentional wrong." It is not necessary that the defendant intended to injure the plaintiff, *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269 (1903). Compare Holmes, J. in *Pierce v. Cunard S. S. Co.*, 153 Mass. 87 (1891), a case where the defendant's conduct clearly fell within the above definition of wanton negligence.

For conduct held not amounting to such wanton negligence, see *Lawrence v. Fitchburg etc. R. Co.*, 201 Mass. 489 (1909) and *Willis v. Boston & N. St. R. Co.*, 208 Mass. 589 (1911).

² See Knowlton, C. J. in *Aiken v. Holyoke R. Co.*, 184 Mass. 269 (1903), p. 271, quoted in *Banks v. Braman*, 188 Mass. 367: "The law is regardful of human life and personal safety, and if one is grossly and wantonly reckless in exposing others to danger, it holds him to have intended the natural consequences of his act, and treats him as guilty of a wilful and intentional wrong. It is no defence to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury there is a constructive intention as to the consequences, which, entering into the wilful, intentional act, the law imputes to the offender, and in this way a charge which otherwise would be mere negligence, becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognized as an elementary principle in criminal law. It is also recognized in civil actions for recklessly and wantonly injuring others by carelessness."

of the person injured is not, properly, characterizable as contributory negligence, and the general rule as to efficiency of such fault to save the wrongdoer from the consequences of his act has no application. True, it is often said in such cases, contributory negligence is not a defense, but logically there is no such negligence possible,³ as the term is ordinarily understood in the classification of the degrees of negligence as maintained here almost from the beginning of our system of jurisprudence. *Astin v. C., M. & St. P. R. Co.*, 143 Wis. 477, 128 N. W. 265.

So it will be seen that, it is somewhat of a misnomer to speak of fault of the plaintiff in this case as contributory negligence. Manifestly there was no negligence on the part of appellant, and could have been none, strictly speaking, falling within the class of faults regarded as mere want of ordinary care and dominated ordinary negligence. The fault was advertent in character. There was an actual or constructive intent to violate the law, equivalent, as indicated, to a constructive intent to cause the consequences which the law was designed to prevent.⁴

SECTION 3.

The Defendant's Ability to Avoid Injury to the Plaintiff Exposed Thereto by His Own Negligence ("Last Clear Chance" Doctrine).

RADLEY v. LONDON & NORTH WESTERN RAILWAY CO.

Court of Exchequer, 1874. L. R. 1873-4, 9 Ex. 71.

Court of Exchequer, 1875. L. R. 1874-5, 10 Ex. 100.

House of Lords, 1876. L. R. 1875-6, 1 App. Cas. 754.

This was an action brought to recover damages from the defendants for injury done to a bridge upon the plaintiffs' siding, under circumstances which are fully stated in the judgment. The

³ See McClellan, J., in *Ga. Pac. R. Co. v. Lee*, 92 Ala. 265 (1890), p. 270-271, and see for the view that such wilful and wanton negligence is a cause so independent of previous conduct of the plaintiff, * * * that (the latter) can not be considered a directly contributing cause of the injury. Knowlton, C. J. in *Banks v. Braman*, 188 Mass. 367 (1905), p. 370. "The ground on which it is held that, when an act of the defendant shows an injury inflicted in this way, the plaintiff need introduce no affirmative evidence of due care, that this previous conduct can not be considered a directly contributing cause of the injury, and, in reference to such an injury, the plaintiff, without introducing evidence, is assumed to be in a position to claim his rights and to have compensation. So far as the cause of his injury is concerned, he is in the position of one who exercises due care."

⁴ In *Pizzo v. Wiemann*, 149 Wis. 235 (1912), an action under a statute making it a criminal offense to sell toy pistols, it was held that the negligence of the boy in its use did not defeat his father's right to recover for his death. "The nature of the wrongful act was such that contributing negligence on the part of the last purchaser is immaterial to either criminal or civil liability of the seller's."—Marshall, J., p. 239.

cause was tried before Brett, J., at the Liverpool Summer Assizes, 1873. The defendants contended that the evidence showed contributory negligence in the plaintiffs, and this question being left to the jury by the learned judge, they found for the defendants. A rule having been obtained for a new trial on the ground that the learned judge misdirected the jury in telling them that there was evidence of contributory negligence in the plaintiffs.

BRAMWELL, B. This is a case of very great complexity, not so much in the facts as in the considerations to which they give rise. So much so that we have thought it desirable to put our opinion in writing. The material facts are as follows:—The plaintiffs are colliery owners, who have sidings out of and on one of the defendants' lines; over these sidings is a bridge belonging to the plaintiffs, with a headway of eight feet. It has been the course of business between the plaintiffs and the defendants for the defendants to take from these sidings the plaintiffs' wagons loaded with coals and deliver or leave them at their destination; also to collect the plaintiffs' wagons when empty, and bring them to the sidings, and there leave them. When the wagons were so left on the sidings, the plaintiffs dealt with them as they saw fit, i. e., took them to the pit to be loaded in such order and at such times as they pleased, or took them to their workshops if they needed repair. On a certain Saturday, after working hours, when the men were gone and the plaintiffs could only move them as they might on a Sunday, i. e., by some special engagement of workmen, the defendants brought and left on one of the plaintiffs' sidings some empty wagons of the plaintiffs', and a wagon, empty except that it had on it a wagon of the plaintiffs' which had broken down and could not travel, and had to be brought in this way to the plaintiffs. The wagon so loaded was, with its load, eleven feet high, and therefore could not pass under the bridge. It remained where so left. On the next Sunday night, after dark, the defendants brought in a very long train of the plaintiffs' empty wagons, and pushed it on the siding where this wagon, loaded with the disabled wagon, was. The wagon was pushed as far as the bridge. Had it been empty it would have passed underneath, and probably the defendants had often pushed wagons in this way under the bridge, though there was evidence to show that they had been requested not to push things on the siding beyond a public highway, which was some distance before getting to the bridge in the direction in which the defendants brought the train of empty wagons. This is, perhaps, of no moment. But the wagon so loaded coming to the bridge and being unable to pass underneath it, the train stopped, and those who had charge of it, without looking to ascertain the cause of the stoppage, gave momentum to the engine to such an extent that the wagon with its load knocked the bridge down. For this the action was brought.

It is needless to say that there was evidence of negligence in the defendants, but the learned judge left it to the jury to say whether, and the jury did say that, there was contributory negligence in the plaintiffs, and found their verdict for the defendants

on that ground. We have to say whether the learned judge was right in the way in which he dealt with this question of contributory negligence.

The plaintiffs contended, first, that there was no evidence of contributory negligence. The way the defendants put it was as follows: They said the plaintiffs knew, or ought to have known, that the loaded wagon had been brought and left at the place where it was so left; they knew it would not pass under the bridge; they knew that the defendants would, or might bring empty wagons on the Sunday, and, to make room for what they brought, would, or might, push forward whatever they found on the siding, as they had done before; that therefore the plaintiffs ought to have moved the loaded wagon, or taken out the broken one, or warned the defendants that it was there. The plaintiffs said, in answer to this, that, assuming they knew the wagon was there with the load, so did the defendants; that the defendants knew also the height of the bridge, and that the wagon with its load would not pass under it; that the defendants knew that working hours were over when they brought it, and that practically the plaintiffs could not move or unload it till Monday; and they said they had a right to suppose that the defendants would not be so negligent, under these circumstances, as to drive this loaded wagon at the bridge, under which it could not pass, and which it would knock down if it pushed against it with sufficient force, the more especially as there was another unoccupied siding on which the empty wagons brought on the Sunday might have been put; that in truth the alleged negligence in the plaintiffs was, not foreseeing and guarding against the negligence of the defendants; that even if they themselves had placed the loaded wagon there, they had no right to anticipate that the defendants would be so negligent as to put any wagon on the siding without seeing what was there, and to push with such force as they did when they found an obstruction.

We think this reasoning correct, and, consequently, that there was no evidence of contributory negligence for the jury. Suppose the defendants had brought the loaded wagon on Sunday night, and pushed as they did, then there would clearly have been no contributory negligence; but how does that differ from the present case, unless it is supposed there was some duty in the plaintiffs to move the loaded wagon on the Saturday, or to give some notice?¹

The plaintiffs further contended, what perhaps is much the same thing differently put, that, according to *Davies v. Mann*, 10 M. & W. 546, assuming there was negligence on their part, yet, if the defendants could have avoided doing the mischief by reasonable care, they were bound to do so; and the plaintiffs objected to the learned judge's summing-up, that this had not been left to the jury. This also seems well founded. There must, therefore, be a new trial.

The defendants took an appeal to the Exchequer Chamber.

¹ Compare the opinion of Taft, J., in *Louisville & N. R. Co. v. East Tenn. R. Co.*, 60 Fed. 993 (1894), especially pp. 996-997, and *Pa. R. Co. v. White*, 88 Pa. 327 (1879).

BLACKBURN, J.² In this case the rule in the Court below for a new trial was made absolute on two grounds, the principal one being that the Court thought that there was no evidence of contributory negligence, by which I understand any neglect of duty or conduct on the part of the plaintiffs sufficient to disentitle them to recover in this action; the second, that, assuming that there was any such evidence, the case was not properly left to the jury. The majority of the Court, I think, are of opinion that on neither ground was the court below right.

I will first state the question, which is really the important one, whether there was evidence which, if properly left to the jury, would take from the plaintiffs the right to recover, assuming that the defendants were guilty of negligence. I believe that there is no dispute, and that for many years there has been no conflict of authority as to what really is the law upon the subject. I think that all the cases uniformly agree in this, that though the plaintiff, or the person who complains of negligence, may himself have been guilty of negligence, and may have put his property in some place where it is exposed to danger, though leaving it there was negligence on his part, yet that does not disentitle him to recover for the consequences of negligence on the part of other persons, which has injured him or his property. A man is bound, when he puts himself in a place where he knows other persons are coming, and are in the habit of coming, not only for his own safety, but for that of his neighbors, to take reasonable care of himself and of his property; but, whether he does this or not, it does not relieve anybody else who comes there from the duty of also taking reasonable care.

The question was asked, would a reasonable man, under the circumstances, have left that high wagon there (because it was its height which made it dangerous), standing, as it did, for thirty-six hours without removing it? It is true that it was after working hours, and after the workmen had left the colliery, but would a prudent man have removed it from the siding? The question was clearly one for the jury, and the jury have rightly answered it by finding that there was negligence. But then it does not follow that the defendants might not be liable. The strongest evidence of their negligence is this, when they were pushing the wagons into the siding and felt a stoppage, which, as we know, was the high wagon coming against the bridge, they concluded that the bridge was high enough to pass under, took back the engine and then brought it with such an impetus, that the trucks were shoved forward against the bridge and brought it down. This was certainly evidence for the jury of negligence on the part of the defendants, and if they thought that this negligence, notwithstanding the fact that the high wagon had been left there, was the proximate cause of the accident, the defendants would have been responsible. But that question was substantially left to the jury. It was pointed out in terms sufficient to bring the question before them, and there was no negligence on the part of the defendants in what they did, unless they knew the

² Mellor, Lush, Brett and Archibald, JJ., concurring, Denman, J., dissenting.

high wagon was there. For if not, there is nothing on their part but what takes place in the ordinary course of business. If that is so I venture to say it is not a question about words, but there was a state of things which would disentitle the plaintiffs to recover, because I think it would appear that not merely the negligence of the plaintiffs in leaving this high wagon standing there was a *causa sine quâ non*, a cause without which the thing would not have happened, for it clearly would not have happened unless the high wagon had been standing there, but also that if the mischief would not have happened but for that negligence on the part of the plaintiffs, and all that was imputed to the defendants was dependent upon this, whether or not they ought to have supposed that the high wagon was there, then, if the defendants had no reason to believe that it was there, they were guilty of no negligence at all,³ and consequently the plaintiff's negligence in leaving it there was the proximate cause of the accident, and not merely the *causa sine quâ non*. The distinction between this and *Davies v. Mann*, 10 M. & W. 546, and that class of cases, is that though the donkey, which was left there, was the *causa sine quâ non*, yet the defendant was guilty of negligence in driving furiously and in a way which would have been negligent even if there had been no donkey there, because he had every reason to expect that other people would come there, and even if an unfettered donkey had been there, although it might have got out of his way, yet it would have been liable to be run over, and therefore the defendant was guilty of negligence. Then the question comes to be, could the plaintiffs avoid the consequences of the defendants' negligence? This being so, I can not agree with the Court below, that there was no evidence of such a state of things as to disentitle the plaintiffs to recover.

The plaintiffs thereupon appealed to the House of Lords.

LORD PENZANCE. The first question on the appeal is, whether the Court of Exchequer Chamber was right in holding that there was any evidence, proper to be submitted to the jury, tending to the conclusion that the plaintiffs themselves had been guilty of some negligence in the matter, and that such negligence had contributed to produce the accident and injury of which they complained.

The decision of the Exchequer Chamber upon this matter ought, I think, to be upheld.

The remaining question is whether the learned Judge properly directed the jury in point of law. The law in these cases of negli-

³In *The Steam Dredge No. 1*, 134 Fed. 161 (C. C. A. 1st Circ. 1904), it was held reversing the decision of Hale D. in 122 Fed. 679 (1903) that, as the admiralty rule of divided damages was less stringent than the common law, the rule denying recovery to a plaintiff guilty of contributory negligence rule in the principal case, which he described as "amelioratory" and introduced for the purpose of "avoiding results which otherwise might shock the common sense of justice," has no application to admiralty cases, and see also the cases cited in his opinion; but compare *Cayser v. Carron*, L. R. 9 App. Cas. 873 (1884), where the decision of the House of Lords can only be supported as an application of the rule in the principal case.

gence is, as was said in the Court of Exchequer Chamber, perfectly well settled and beyond dispute.

The first proposition is a general one, to this effect, that the plaintiff in an action for negligence can not succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

This proposition, as one of law, can not be questioned. It was decided in the case of *Davies v. Mann*, 10 M. & W. 546, supported in that of *Tuff v. Warman*, 5 C. B. (N. S.) 573; 27 L. J. C. P. 322, and other cases, and has been universally applied in cases of this character without question.

The only point for consideration, therefore, is whether the learned Judge properly presented it to the mind of the jury.

It seems impossible to say that he did so. At the beginning of his summing-up he laid down the following as the propositions of law which governed the case: It is for the plaintiffs to satisfy you that this accident happened through the negligence of the defendants' servants, and as between them and the defendants, that it was solely through the negligence of the defendants' servants. They must satisfy you that it was solely by the negligence of the defendants' servants, or, in other words, that there was no negligence on the part of their servants contributing to the accident; so that, if you think that both sides were negligent, so as to contribute to the accident, then the plaintiffs can not recover.

This language is perfectly plain and perfectly unqualified, and in case the jurors thought there was any contributory negligence on the part of the plaintiffs' servants, they could not, without disregarding the direction of the learned Judge, have found in the plaintiffs' favor, however negligent the defendants had been, or however easily they might with ordinary care have avoided any accident at all.

The learned Judge then went on to describe to the jury what it was that might properly be considered to constitute negligence, first in the conduct of the defendants, and then in the conduct of the plaintiffs; and having done this, he again reverted to the governing propositions of law, as follows: "There seems to be two views. It is for you to say entirely as to both points. But the law is this, the plaintiff must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants."

This again, is entirely without qualification, and the undoubted meaning of it is, that if there was any contributory negligence on the part of the plaintiffs, they could in no case recover. Such a statement of law is contrary to the doctrine established in the case of *Davies v. Mann*, 10 M. & W. 546, and the other cases above alluded to, and in no part of the summing-up is that doctrine anywhere to be found. The learned counsel were unable to point out any passage addressed to it.

It is true that in part of his summing-up the learned Judge pointed attention to the conduct of the engine-driver, in determining to force his way by violence through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add that if they thought the engine-driver might at this stage of the matter by ordinary care have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.

In point of fact the evidence was strong to show that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine-driver would, notwithstanding any previous negligence of the plaintiffs in leaving the loaded-up truck on the line, have made the accident impossible. This substantial defect of the learned Judge's charge is that that question was never put to the jury.

On this point, therefore, I propose to move that your Lordships should reverse the decision of the Exchequer Chamber, and direct a new trial.

LORD BLACKBURN. My Lords, I agree entirely with the noble Lord who has first spoken as to what were the proper questions for the jury in this case, and that they were not decided by the jury. I am inclined to think that the learned judge did in part of his summing-up sufficiently ask the proper questions, had they been answered, but unfortunately he failed to have an answer from the jury to those questions, it appearing by the case that the only finding was as to the plaintiff's negligence.

I agree, therefore, in the result that there should be a new trial.*

Judgment of the Court of Exchequer Chamber reversed.

Judgment of the Court of Exchequer restored, and a new trial ordered, with costs.

* *Accord*: where the defendant actually knew of the helpless peril into which the plaintiff's negligence had brought him or had notice of facts sufficient to indicate that the plaintiff or some one else was in such peril, *Chicago, Indianapolis & Louisville R. Co. v. Pritchard*, 168 Ind. 399 (1906); *Cayser v. Carron*, L. R. 9 App. Cases 873 (1884), libel in admiralty for collision between two vessels; *Austin v. N. J. Steamboat Co.*, 43 N. Y. 75 (1870), similar facts; *Inland Coasting Co. v. Folsom*, 139 N. S. 551 (1890), p. 558; *Costello v. Third Ave. R. Co.*, 161 N. Y. 317 (1900), and *Smith v. Connecticut R. etc. Co.*, 80 Conn. 268 (1907); *Louisville & N. R. Co. v. Harrod*, 155 Ky. 155 (1913); *Valin v. Milwaukee & N. R. Co.*, 82 Wis. 1 (1892); but see *Bolin v. Chicago, St. P., M. & O. R. Co.*, 108 Wis. 333 (1901), and *Tesch v. Milwaukee Electric R. & Light Co.*, 108 Wis. 593 (1901); *Redford v. Spokane St. R. Co.*, 15 Wash. 419 (1896); *Eastburn v. Norfolk & W. R. Co.*,

IOWA CENT. R. CO. et al. v. WALKER.

Circuit Court of Appeals, Eighth Circuit, 1913. 203 Fed. Rep. 685.

WM. H. MUNGER, District Judge. This action was brought by the defendant in error, who will be designated as plaintiff, against plaintiff in error, who will be designated as defendant, to recover for an injury sustained by being struck by the engine of defendant's train. It appears that plaintiff was in the employ of defendant as telegraph operator at New Sharon, Iowa, and also assisted the station agent in and about handling the baggage, receiving the same from trains, and delivering the same to trains. The defendant's railroad track ran practically north and south on the east side of the depot; there being a platform between the depot and the tracks. A freight train from the north was about two hours late. Plaintiff inquired of the dispatcher where the train was, and was informed that it had not yet reached Searsboro, a station about eight miles north of New Sharon. Plaintiff then went out to a baggage truck standing close to the edge of the platform next to the track to the northeast of the depot, took a hand grip off, handed it to a lady, had a little conversation with a gentleman, returned to the truck, pushed it along on the platform to the south, with a view of taking the truck to the west side of the depot, where the train of another road was soon expected. There was snow on the platform, varying in depth, according to the evidence, from three to eight inches, the snow had been tramped down some, and a path had been shoveled down to the edge of the platform. Plaintiff, to avoid the snow, wheeled the truck close to the east edge of this platform. Just about as he reached the southeast corner, and while turning or about to turn the truck to the west, he was struck by this freight train coming on the defendant's track from the north, and sustained the injuries complained of. He alleged in his petition negligence of the defendant in permitting the accumulation of snow upon the platform, the running of the train at a negligent rate of speed, failing to give any signal by blowing the whistle or ringing the bell, and further alleged negligence upon the part of the defendant, in that, after the engineer discovered him in a place of peril, by the exercise of ordinary care, he could have avoided the injury.

34 W. Va. 681 (1891), and see cases cited in note to *Iowa Central R. Co. v. Walker*, *post*, p. 1387.

It is immaterial whether the defendant's subsequent conduct is active or passive, he is as fully liable where, with knowledge of the plaintiff's peril, he fails to take steps to stop the vehicle which he is driving so as to prevent a collision, as in *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621 (1877), or to take any steps apparently necessary to avoid doing injury to the plaintiff, *Denver & Berkeley Park Transit Co. v. Dwyer*, 20 Colo. 132 (1894); *Louisville etc. R. Co. v. Harrod*, 155 Ky. 155 (1913), as where he is guilty of positive injurious action, such as the improper navigation after knowledge that the plaintiff's boat is in a position of danger, as in *Austin v. N. J. S. S. Co.*, 43 N. Y. 75 (1870), and *Cayzer v. Carron*, L. R. 9 App. Cases 873 (1884), or the act of a motorman in accelerating the speed of his car after observing that the plaintiff is negligently attempting to cross the tracks, as in *Costello v. Third Ave. R. Co.*, 161 N. Y. 317 (1900), and *Smith v. Connecticut R. Co.*, 80 Conn. 268 (1907).

The trial court, in its charge to the jury, eliminated all questions of negligence excepting the latter, saying to the jury:

"But, as I have already said to you, down to the time he was within the danger limit, could he, by the exercise of diligence, have been seen by the engineer to be inside of the danger limit? Then, from that point, had this engineer exercised care and freedom from negligence, as he ought to do, could he then have averted the injury? If not, then your verdict will be in favor of the company. If he, the engineer, could have averted the injury after he saw the hazardous position in which the plaintiff had placed himself, then you will find a verdict for the plaintiff."

This instruction was faulty, in that it submitted to the jury the question as to whether or not, in the exercise of diligence on part of the engineer, he could have discovered that the plaintiff was inside the danger limit. The instruction in that respect was excepted to by defendant.

In *Denver City Tramway Co. v. Cobb*, 164 Fed. 41, 90 C. C. A. 459, Justice Van Devanter, then Judge Van Devanter, speaking with regard to the exception which permits plaintiff to recover, notwithstanding his own contributory negligence, said:

"The exception does not apply where the plaintiff's negligence or position of danger is not discovered by the defendant in time to avoid the injury."

In *Hart v. Northern Pac. Ry. Co.*, 196 Fed. 180, 116 C. C. A. 12, this court said:

"It presupposes or concedes the existence of contributory negligence, and seeks to avoid its consequence by subsequent occurrences. If it were true that Starr was in a state of actual peril, that the defendant had actual knowledge of that peril, and after that knowledge was acquired failed to exercise ordinary care to prevent injuring him, these facts might create a cause of action, or might excuse the contributory negligence which brought Starr into his position of peril."

Numerous other authorities might be cited to the same effect, to wit, that the defendant's liability under what is known as the last chance doctrine is only where, after actual discovery of the plaintiff's perilous position the injury could be avoided by the exercise of ordinary care and diligence.

There was a conflict in the evidence as to whether the plaintiff, while he was wheeling the truck on the platform to the south, was so near the track that he would be struck by the overhang of the engine, or whether the first time that he placed himself in position to be struck by the overhang of the engine was as he swung the truck to turn to the west. That, however, was a proper question for the jury. Assuming, however, that the engineer saw the plaintiff moving so near the edge of the platform that he might be struck by the overhang of the engine, he had a right to assume that the plaintiff would step to one side out of the danger line, and the engineer was not called upon to act until he discovered that the plaintiff probably would not step to one side. *Little Rock Ry. &*

Elec. Co. v. Billings, 173 Fed. 903, 98 C. C. A. 467, 31 L. R. A. (N. S.) 1031, 19 Ann. Cas. 1173; *St. Louis & S. F. R. Co. v. Summers*, 173 Fed. 358, 97 C. C. A. 328; *Ill. Cent. Ry. Co. v. Ackerman*, 144 Fed. 959, 76 C. C. A. 13; *Lake Shore & Michigan Southern Ry. Co. v. Miller*, 25 Mich. 274; *Southern Railway Co. v. Bailey*, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379; *Beem, Adm'r, v. Tama & Toledo Elec. & Ry. Co.*, 104 Iowa, 563, 73 N. W. 1045.

The evidence, however, is undisputed that, as soon as the engineer operating the train discovered that plaintiff was in a position of danger he applied the emergency brake, and stopped the train as soon as possible, the train coming to a stop within about 100 feet.

At the close of all the evidence, defendant requested the court to instruct a verdict for the defendant, which was overruled, to which an exception was taken. As the evidence was indisputable and conclusive that, as soon as the engineer knew that the plaintiff was in a situation of danger, he immediately did all that could be done to avoid the accident by applying the emergency brake, the requested instruction should have been given.

The judgment is reversed, with directions to grant a new trial.¹

TEAKLE v. SAN PEDRO, L. A. & S. L. R. CO.

Supreme Court of Utah, 1907. 32 Utah 276.

STRAUP, J. This court, in harmony with the great weight of authority, seems to be committed to the rule (when the injured or deceased person was not a trespasser) that the defendant's act of negligence will be regarded as the sole proximate cause of the injury, not only when relating to a breach of duty occurring after the consequences of contributory negligence have been discovered,

¹ *Accord: Richmond etc. R. Co. v. Didzoneit*, 1 App. Cas. (D. C.) 482 (1893); *Cullen v. B. & P. R. Co.*, 8 App. Cas. (D. C.) 69 (1896); *Krenzer v. P., C. & St. L. R. Co.*, 151 Ind. 587 (1898), but see *Indianapolis Trac. & C. Co. v. Kidd*, 167 Ind. 402 (1906); *Indianapolis and Traction Co. v. Croly*, *post*, p. 1403; *Gilbert v. Erie R. Co.*, 97 Fed. 747 (1899); *Herbert v. So. Pac. R. Co.*, 121 Cal. 227 (1898); *Bourrett v. Chicago & N. W. R. Co.*, 152 Iowa 579 (1911); *Purcell v. Chicago & N. W. R. Co.*, 117 Iowa 667 (1902); *Anderson v. Minn., St. P. & S. M. R. Co.*, 103 Minn. 224 (1908); *Chicago, B. & Q. R. Co. v. Lilley*, 93 N. W. 1012 (Nebr. 1903), but see *Chicago, B. & Q. R. Co. v. Wymore*, 40 Nebr. 645 (1894) and *Omaha St. R. Co. v. Martin*, 48 Nebr. 65 (1896); *Stewart v. Portland Ry. etc. Co.*, 58 Ore. 377 (1911), *semble*; *Smith v. So. Pac. R. Co.*, 58 Ore. 22 (1911), *semble*, and *Scholl v. Belcher*, 63 Ore. 310 (1912), where the court refused to decide whether knowledge was essential. See, also, *Bragg v. Central New England R. Co.*, 152 App. Div. 444 (N. Y. 1912), where it was held that where the negligence of each consisted in the failure to discover the negligence of the other there could be no recovery; a flagman sent out by a train, fell asleep by the side of the track, and not being seen by the engineer, was there run over by his train.

It is clearly not necessary that the defendant should know of the particular danger of the particular plaintiff, it is enough that he is warned of danger ahead, whether by the warnings of others or by his senses, and fails to take steps to bring his actions under complete control so that he may avoid the

but also when, in the exercise of ordinary care, such consequences could have been discovered, if a breach of duty intervened or continued after the commission of the contributory negligence. While the breach of duty must be subsequent to the commission of the contributory negligence, yet such breach of duty may be before, as well as after, the discovery of the peril.

There is much reason for the distinction that the railroad company should not be held liable in case of an actual or conscious trespasser until his position of danger is discovered, and should be held liable in case of one not a trespasser exposed to peril through negligence, not only after the consequences of such negligence have been discovered, but which ordinarily could have been discovered, if there was a breach of duty continuing or intervening after the commission of the contributory negligence.¹ In the one

injury, *Chicago, I. & L. R. Co. v. Pritchard*, 168 Ind. 399 (1906) and cases cited therein, engineer ignored signals to stop and ran down plaintiff who was pinned down by material fallen from freight car. As to the liability of a defendant who sees on or near his path an object, which from its appearance may or may not be a helpless human being, see *Louisville, H. & St. L. R. Co. v. Hathaway*, 121 Ky. 666 (1905), 2 L. R. A. (N. S.) 498, with valuable note.

¹ Accord: *Tuff v. Warman*, 2 C. B. (N. S.) 740 (1857), 5 C. B. (N. S.) 573 (1858); *Kansas City, Ft. S. & M. R. Co. v. Cook*, 66 Fed. 115 (1895); *Texas & P. R. Co. v. Nolan*, 62 Fed. 552 (1894); *Baltimore & Ohio R. Co. v. Anderson*, 85 Fed. 413 (1898); *Birmingham R. Co. v. Brantly*, 141 Ala. 614 (1904); *Denver & R. G. R. Co. v. Buffehr*, 30 Colo. 27 (1902); *Elliott v. New York & C. R. Co.*, 84 Conn. 444 (1911); *Louisville & N. R. Co. v. Earl*, 94 Ky. 368 (1893); *Owensboro City R. Co. v. Hill*, 21 Ky L. 1638 (1900); *Flynn v. Louisville Ry.*, 110 Ky. 662 (1901); *Baltimore & Ohio R. Co. v. State to use of Trainor*, 33 Md. 542 (1870); *Baltimore Consolidated R. Co. v. Rifcowitz*, 89 Md. 338 (1899); *Battishill v. Humphreys*, 64 Mich. 494 (1887); *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261 (1887); *Rapp v. St. Louis Transit Co.*, 190 Mo. 144 (1905); *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143 (1903); *Bunting v. Cent. Pac. R. Co.*, 16 Nev. 277 (1881); *Lake Shore & M. S. R. Co. v. Schade*, 15 Ohio C. C. 424 (1895), 57 Ohio St. 650 (1897); *Drown v. Northern Ohio Trac. Co.*, 76 Ohio St. 234 (1907); *Bullock v. Wilmington & W. R. Co.*, 105 N. Car. 180 (1890); *Bogan v. Carolina Cent. R. Co.*, 129 N. Car. 154 (1901); *H. & T. C. R. Co. v. Sympkins*, 54 Tex. 615 (1881); *Baltimore & Ohio R. Co. v. Few*, 94 Va. 82 (1896). See *Costello v. Third Ave. R. Co.*, 161 N. Y. 317 (1900) with which compare *Rider v. Syracuse Rapid Transit Co.*, 171 N. Y. 139 (1902), *Green v. Erie R. Co.*, 11 Hun 333 (N. Y. 1877), and also see *Bodie v. Charleston & W. C. R. Co.*, 61 S. Car. 468 (1901).

A passenger seeking to alight from a railroad or street railway car and carelessly going upon the step while the car is in motion, may recover if the conductor or motorman caused the speed to be suddenly increased, so jolting her from her negligently perilous position, *Washington etc. R. Co. v. Harmon*, 147 U. S. 571 (1893); *Peoples Pass. R. Co. v. Green*, 56 Md. 84 (1880); *Baltimore Consolidated R. Co. v. Armstrong*, 92 Md. 554 (1901); *Central of New Jersey R. Co. v. Van Horn*, 38 N. J. L. 133 (1875); *Cawfield v. Asheville R. Co.*, 111 N. Car. 597 (1892); see also *Omaha St. R. Co. v. Martin*, 48 Nebr. 65 (1896).

So where a street railway car is discharging passengers, those in charge of another car, approaching the point on parallel tracks, are bound to have the latter in such control that they can avoid striking those passengers of the first car who, in their effort to reach the opposite pavement, may walk behind their own car upon such parallel track, *Louisville R. Co. v. Hudgins*, 124 Ky. 79 (1906); *Rapp v. St. Louis Transit Co.*, 190 Mo. 144 (1905); contra, *Buzby v. Philadelphia Traction Co.*, 126 Pa. St. 559 (1889). This

instance the train operatives were not called upon to expect or anticipate the trespass or the presence of persons, and hence owed no duty of lookout or of giving warnings. In such case no duty was imposed on them until the trespasser was discovered in a position of peril. In such case the liability of the company must solely depend upon a breach of duty subsequent to the discovery.² If, on the other hand, through a long usage or custom the public has made a thoroughfare of the track in a populous city or thickly settled community though not with any express authority but under circumstances of an implied license, the train operatives are required to reasonably expect and anticipate the probable presence of persons on or near the track at such place, and there is consequently imposed on the train operatives a duty towards such persons of a reasonable lookout.³ When, therefore, it is said that the railway company is liable in such case for an omission of duty on the part

principle is also applied where passengers alighting at a station from a steam railway train must, in order to reach the platform, cross the intervening railroad track, *Warner v. B. & O. R. Co.*, 168 U. S. 339 (1897). In such case it is held in *Pennsylvania R. Co. v. White*, 88 Pa. 327 (1879), that the plaintiff is entitled to rely upon the company performing its duty not to run trains upon such intervening track and is not guilty of negligence in failing to stop, look or listen before crossing it.

²In many jurisdictions the railroads are held bound to keep a lookout for trespassing cattle and to be liable notwithstanding the negligence of the owner in allowing his cattle to stray, if their peril could have been observed and the collision avoided, *O'Keefe v. Chicago R. I. & P. R. Co.*, 32 Iowa 467 (1871); *Masser v. Chicago R. I. & P. R. Co.*, 68 Iowa 602 (1886); *Tennis v. Inter State Consolidated Rapid Transit R. Co.*, 45 Kans. 503 (1891); *Haley v. Kansas City M. & B. R. Co.*, 113 Ala. 640 (1896); *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257 (1887); *L. & N. R. Co. v. Howard*, 82 Ky. 212 (1884); *Russell v. Maine Cent. R. Co.*, 100 Maine 406 (1905); *Ricketts v. B. & O. R. Co.*, 69 Md. 494 (1888); *Locke v. First Div. St. Paul R. Co.*, 15 Minn. 350 (1870); *Egan v. Montana Cent. R. Co.*, 24 Mont. 569 (1901); *Terry v. New York Cent. R. Co.*, 22 Barb. 574 (N. Y. 1855); *Ward v. So. Pac. R. Co.*, 25 Ore. 433 (1894); *Seaboard & R. Co. v. Joyner*, 92 Va. 354 (1895); *Newport News & M. V. Co. v. Howe*, 52 Fed. 362 (1892); *Gulf C. & S. F. R. Co. v. Bolton*, 2 Ind. Ter. 463, 51 S. W. 1085 (1899).

³So it is held in many jurisdictions that the railroads are bound to keep a lookout to observe the presence of trespassing cattle upon their tracks and are bound to keep a lookout for human beings there trespassing, at least at those points where the public is accustomed to use the track for crossing or to walk upon or by the side of it, *Isbell v. N. Y. & N. H. R. Co.*, 27 Conn. 393 (1858); *Gorman v. Pac. R. Co.*, 26 Mo. 441 (1858); *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226 (1870); *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172 (1854), trespassing cattle; accord, *L. R. & F. S. R. Co. v. Finley*, 37 Ark. 562 (1881), but see *Memphis & L. R. Co. v. Kerr*, 52 Ark. 162 (1889); *Chesapeake & O. R. Co. v. Keelin*, 22 Ky. L. R. 1942 (1901); *Pickett v. Wilmington & W. R. Co.*, 117 N. Car. 616 (1895); *Bogan v. Carolina Cent. R. Co.*, 129 N. Car. 154 (1901); *H. & T. R. Co. v. Sympkins*, 54 Tex. 615 (1881); *St. Louis & S. W. R. Co. v. Shiflet*, 98 Tex. 326 (1904); *Murphy v. Wabash R. Co.*, 228 Mo. 56 (1910), trespassing persons. See note to *East Kentucky R. Co. v. Powell*, ante.

While a railroad is not bound to keep a lookout to see whether horses, which may be standing on the highway near the tracks, are frightened by the approach of the train, those in control of the train must, if the fright of such a horse is discovered, take steps to prevent harm resulting therefrom, *Louisville & N. R. Co. v. Harrod*, 155 Ky. 155 (1913).

of the train operatives, not only after the consequences of the injured or deceased's negligence have been discovered, but also for such an omission of duty, as had it been reasonably performed, such consequences could ordinarily have been discovered, it necessarily implies the existence of a duty owing by the train operatives toward the injured or deceased person before as well as after the commission of the contributory negligence. In other words, before a person inflicting an injury can be charged with an omission of duty in failing to discover a perilous situation of another, there must be a duty owing from him to the injured or deceased person, which, had it been performed with reasonable care, would have disclosed to him the exposed situation of the person receiving the injury.⁴

FRENCH v. THE GRAND TRUNK RAILWAY CO

Supreme Court of Vermont, 1904. 76 Vt. 441.

START, J. The action is for the recovery of damages alleged to have accrued to the plaintiff by reason of being struck by an engine while attempting to cross the defendant's railroad track. The defendant requested the court to instruct the jury, "that on all the evidence in the case the plaintiff is not entitled to recover." This is, in effect, a motion for a verdict, and sufficiently states the ground of the motion; and, by excepting to the refusal of the court to comply with the request, the defendant has reserved for the consideration of this Court the question of whether, upon the most favorable view for the plaintiff of all the evidence, he was entitled to recover.

⁴The defendant's train was being backed over a part of its tracks which the public were accustomed to use as a crossing. The brakeman who was keeping a lookout on the front car saw the plaintiff trying to cross the track and called to him and as soon as the train struck him signalled to the engineer to stop the train, but the engineer was not watching for the brakeman's signal, so made no effort to stop. The plaintiff was thrown under the train, which was 180 feet long, and was not seriously hurt until struck and killed by the fire box of the locomotive.

The court held that it was error to exclude evidence that the train could have been stopped within twenty feet, since, though the plaintiff's failure to look out for the approach of the train was negligence concurring with that of the defendant to produce the original collision, so that he could not have recovered for injuries then received; his negligence was spent when struck and rendered powerless to help himself, and the evidence tended to show that had the engineer performed the duty owing to the plaintiff as one of the public to be on the alert when approaching this crossing, he could, by stopping the train, have avoided killing him. *Accord: Metropolitan St. R. Co. v. Arnold*, 67 Kans. 260 (1903), where the defendants' motorman had he been looking out, could have observed the plaintiff who negligently tried to cross in front of the car and after being struck, clung, practically unhurt, to the fender while the car proceeded 75 feet farther and then was drawn under the wheels and killed, with which compare *Dyerson v. R. Co.*, note to *French v. R. Co.*, *post*; *contra, Bourrett v. Chicago & N. W. R. Co.*, 152 Iowa 579 (1911), reversing on rehearing *Bourrett v. Chicago & N. W. R. Co.*, 121 N. W. 380 (Iowa 1909), where a boy running across a track after a ball was struck by a train backing without a lookout and was dragged for a considerable distance before losing his hold and falling under the wheels.

The plaintiff gave evidence tending to show, that he walked from the public crossing through the railroad yard of the defendant, along the side of a lot of box cars some two hundred and thirty feet, and then passed the end of the line of box cars; that he looked to the right and left, went right along and attempted to cross the defendant's main line and, in so doing, was struck by the defendant's express train, coming from the west; that, as he passed the end of the box cars, he could see toward the west a distance of the length of two or three cars; and that he knew it was about time for the express to arrive and that it was dangerous to be on the track. The actual measurements of the surveyor, which were disputed only by estimates, from the position of a man stepping over the north rail, show that a person could see one hundred and eighty-eight feet along the north rail, and two hundred and twenty-three feet along the south rail. The train made a good deal of noise, and, upon the shout of warning from by-standers, the plaintiff did not quicken his pace in any way, but looked up, not in the direction of the approaching train, but in the direction of those who called to him; and, at the time he was struck, he was stepping over the last rail—had one foot over.

Upon these facts the plaintiff was not entitled to recover. There is no view of the evidence that relieves him from the charge of contributory negligence. He was in the possession of all his mental and physical faculties. He knew the express train was due. He was struck as he was stepping over the last rail. One step would have brought him to a place of safety. Assuming that he could see along the track over which the train was approaching for a distance of only the length of two or three cars, as testified by him, if he had had a regard for his own safety and looked and listened as he was crossing the track, he would have seen or heard the train, quickened his pace and reached a place of safety. If he had looked or listened before stepping upon the track, he would have heard or seen the train; and, if mindful of his safety, he would have stopped and avoided the collision. If he had quickened his pace when his attention was called to the approaching train, he could have saved himself. He was unencumbered and capable of easily hastening or checking his movements; and, if he had looked when he was in the middle of the track, he could have seen the engine in season to have stepped clear of danger. He could have seen the danger and avoided it at a time when it was too late for the defendant's servants to stop the train and avoid a collision. There was no time when the defendant's servants could have stopped the train and avoided the injury, in which the plaintiff could not have avoided being injured by a vigilant use of his eyes, ears and physical strength. It was his duty to make a vigilant use of these faculties up to the last moment when it was possible for him to do so. If he did not see or hear the train, if he did not heed the warning that was given him, it was because he was not mindful of his safety, when he was in a place that he knew was dangerous. It was because he was careless, and that carelessness continued until

he was injured. His negligence was not a precedent negligence. He exposed himself to danger that was the beginning and not the end of his negligence, and his negligence was the proximate cause of the injury.

The plaintiff relies upon the case of *Willey v. The Boston & Maine R. R. Co.*, 72 Vt. 120, 47 Atl. 398. It is true, that, by the rule there broadly and without qualification stated, the defendant would be liable, if, when it became apparent that the plaintiff was going upon the track, its servants did not do what they could to avoid injuring him, notwithstanding he was negligent; but this is not the true rule, or rather is not all there is to the rule. It is true, that, when a traveler has reached a point where he can not help himself, can not extricate himself, and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition and not the proximate cause of the injury, and will not preclude a recovery; but it is equally true, that, if a traveler, when he reaches the point of collision, is in a situation to help himself, and by a vigilant use of his eyes, ears and physical strength to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case, the negligence of the plaintiff is concurrent with the negligence of the defendant, and the negligence of each is operative at the time of the accident. When negligence is concurrent and operative at the time of the collision and contributes to it, there can be no recovery.

Judgment reversed, and cause remanded.¹

¹ Accord: *Fraser v. South & North Alabama R. Co.*, 81 Ala. 185 (1886); *Hot Springs Street R. Co. v. Johnson*, 64 Ark. 420 (1897); *Everett v. Los Angeles Consol. Elec. R. Co.*, 115 Cal. 105 (1896); *Green v. Los Angeles Terminal Co.*, 143 Cal. 31 (1904); *Dyerson v. Union Pac. R. Co.*, 74 Kans. 528 (1906); *Robards v. Indianapolis St. R. Co.*, 32 Ind. App. 297 (1904), but see *Indianapolis Trac. & Terminal Co. v. Kidd*, 167 Ind. 402 (1906), and *Indianapolis Trac. Co. v. Croly, post*; *Butler v. Rockland T. & C. St. R. Co.*, 99 Maine 149 (1904); *Hammers v. Colo. etc. R. R.*, 128 La. 648 (1911); *Drown v. Northern Ohio Trac. Co.*, 76 Ohio St. 234 (1907); *Smith v. Norfolk & S. R. Co.*, 114 N. Car. 728 (1894); *Upton v. S. Carolina & G. E. R. Co.*, 128 N. Car. 173 (1901); *Richmond Pass. etc. Co. v. Gordon*, 102 Va. 498 (1904); *Visacchero v. Rhode Island Co.*, 26 R. I. 392 (1904); *Gilbert v. Erie R. Co.*, 97 Fed. 747 (1899); *Northern Pac. R. Co. v. Jones*, 144 Fed. 47 (1906); *Southern R. Co. v. Bailey*, 110 Va. 833 (1910). Many of these cases are complicated by the fact that the injury is due to a collision with a plaintiff wrongfully walking on the defendants' right of way, if a railroad; or, if a street railway, walking, riding or driving on its tracks, where the public are held bound to make way for the cars and where, therefore, the engineers and motormen are held justified in assuming that the plaintiff will leave the place of peril and so is not bound to anticipate injury to him until he knows of his inability to do so or his fixed purpose to remain, *Norfolk & Western R. Co. v. Dean's Adm.*, 107 Va. 505 (1907); *Neal v. Carolina Cent. R. Co.*, 126 N. Car. 634 (1900). So, too, an engineer or motorman seeing a man in apparent possession of his faculties approaching the track is entitled to assume that he will not attempt to cross if the car is in plain sight, *Backus v. Norfolk & Atlantic Terminal Co.*, 112 Va. 292 (1911).

In Maine and Michigan a street railway is held liable to a person injured by being struck from behind while driving along the tracks or seated in a wagon standing near the tracks, *Atwood v. Bangor, O. & O. T. R. Co.*,

ABBIE WARNER v. PEOPLES' ST. RAILWAY CO.

Supreme Court of Pennsylvania, 1891. 141 Pa. 615.

On July 2, 1888, Abbie Warner, by her next friend, George Warner, brought trespass against the Peoples' Street Railway Company of Luzerne county, incorporated by the act of March 23, 1865, P. L. (1866) 1199. Issue.

At the trial, on April 14, 1889, testimony was submitted to show that the defendant's road, upon which cars drawn by horses are used, runs between Scranton and Dunmore along one side of the public highway, the other side being generally used as a carriage and foot-way; that on March 16, 1888, a severe snow storm occurred, and a drift had formed along the car track near Scranton, from two feet deep in some places, to two feet and a half in others, and extending a distance of about one-half a usual city block; that on March 17th, the railway company had shoveled out a way along its track through the drift, not more than wide enough for the passage of its cars; that, in the afternoon of that day, the plaintiff, about eighteen years of age, passing from Scranton towards Dunmore, approached the cut through the drift, to enter it along the street car track as the better way for walking.

The plaintiff testified that before she entered the cut she looked back and could see no car approaching; but, on the part of the defendant, there was testimony that a car could have been seen for a distance of from a quarter to half a mile from the point from which the plaintiff said she had looked. The plaintiff testified, further, that shortly after she entered the cut she was overtaken by a car, driven very rapidly, when she stepped off the track against the bank of snow; that the horses and front end of the car passed her, but she was struck by the rear end, thrown beneath the wheels, and injured. On the part of the defendant there was testimony that the car approached the cut, with bells on the horses, slowly up an ascending grade, until at or near the mouth of the cut where there was a switch, and that the driver was watching for a broken rail at the switch, and did not see the plaintiff till the horses reached the point where she had stepped aside.

MR. JUSTICE MITCHELL. The place of the accident was in the public road, where both parties had a right to be, and where each, therefore, was bound to be on the lookout for the other: *Schmidt v. McGill*, 120 Pa. 405. But the right of the defendant's cars was superior. They were confined to the track, and on that they had

91 Maine 399 (1898); *Fickett v. Lewiston, A. & W. St. R. Co.*, 110 Maine 267 (1913); *Bedell v. Detroit, Y. & A. A. R. Co.*, 131 Mich. 668 (1902); *Montgomery v. Lansing City Elec. R. Co.*, 103 Mich. 46 (1894), though not to one injured while attempting to cross such tracks without first looking for the cars, *Fritz v. Detroit Citizens St. R. Co.*, 105 Mich. 50 (1895), even though the motorman saw that the plaintiff was negligently ignorant of the peril into which he was running, *Butler v. Rockland T. & C. Street R. Co.*, 99 Maine 149 (1904).

the right of way, to which the use by other parties, on foot or otherwise, was of necessity subordinate. The plaintiff, on the other hand, could use the whole road, and which part of it she took was merely a matter of convenience. That defendant in clearing its track from snow for the passage of its cars had made it also more convenient for plaintiff to walk on, could not be turned to its disadvantage, or enlarge the plaintiff's rights over that part of the public road. They were still subordinate to defendant's right of way: *Jatho v. Railway Co.*, 4 Phila. 24; *Thomas v. Railway Co.*, 132 Pa. 504; *Adolph v. Railway Co.*, 76 N. Y. 530.

These being the respective rights of the parties, the plaintiff came to a point on the road where the defendant's track ran through a snow-drift, for a distance estimated by plaintiff herself at half a block, where the snow had been removed from the track, leaving a passage just wide enough for the cars, with vertical walls of snow two or two and a half feet in height. It was plainly a place of danger for a foot passenger, in case a car should reach it, and therefore a place for unusual caution and vigilance. But the rest of the road was, as plaintiff testified, ankle deep in snow and slush, and plaintiff took the more dangerous, but more comfortable way. She says she looked just before she went into the cut, to see if there was a car behind her, and saw none. But on this, the pivotal point of the case, the uncontradicted evidence is overwhelmingly against her. The drift was at the top of a hill or rise, from which there was an unobstructed view in the direction from which the car was coming, fixed by the plaintiff's own witnesses at quarter to half a mile, and up this hill the car came at a moderate speed, with bells that could be heard for forty rods. Yet plaintiff herself says she got but a little way into the passage before the car came upon her. It is unquestionable that the car must have been plainly in sight at the time she entered this dangerous path, and if she looked at all it must have been a mere heedless glance, which all the evidence shows was not an adequate performance of the duty the situation required. The case belongs clearly to the class of *Carroll v. Railroad Co.*, 12 W. N. 348, and required the court to pronounce plaintiff negligent as matter of law. The defendant's second point should have been affirmed.

As this point is conclusive of the case, it is not necessary to discuss the others.

Judgment reversed.¹

TROW v. VERMONT CENTRAL R. CO.

Supreme Court of Vermont, 1852. 24 Vt. 487.

ISHAM, J. The declaration in this case, in substance states, that the defendants are the owners and occupiers of a certain Rail-

¹ See accord: *Winter v. Federal Street, etc., R. Co.*, 153 Pa. St. 26 (1893); *Schnur v. Citizens' Trac. Co.*, 153 Pa. St. 31 (1893); compare *Sieb v. Central Penna. Traction Co.*, 47 Pa. Sup. 228 (1911), and *Fenner v. Wilkes-*

road passing through "Falls Village," in the town of Northfield, and by the side of and across a public highway, leading through that village; and that being such owners and occupiers, it was their duty to construct and maintain fences by the side of their road, suitable to prevent cattle and other animals from passing upon the railroad track; and also, for the same purpose to erect and maintain suitable cattle guards at all farm and road crossings. It is averred, that the defendants have neglected their duty in erecting fences by the side of their road, through that village, and in constructing such cattle guards; and that in consequence of this neglect, the plaintiff's horse was found upon the railroad track, and was so injured as to be rendered wholly worthless, by being run upon by an engine of the defendants, while in the use of their road.

It is to be observed that the plaintiff has not in his declaration, nor by evidence on the trial, attempted to charge the defendants with any neglect or want of care in conducting and managing the engine, at the time the injury was committed. We are, therefore, to assume in this investigation, that the train was properly conducted, and that there was in this respect, the exercise of that reasonable care and prudence on the part of the defendants and their agents, which the law requires, at the time the injury was committed.

The case on the part of the plaintiff, must therefore rest upon a duty, imposed by law upon the defendants, to erect and maintain such fences and cattle guards upon their road, as will prevent horses and other animals from passing thereon, and upon proof, that the injury was occasioned by a neglect on their part to perform that duty.

That a duty of that character rests upon this corporation, must be considered as settled in this State, by a decision of this court in the case of *Quimby v. Vt. Cent. R. R. Co.*, 23 Vt. 393.

The important question presented in this case, arises upon the evidence introduced by the defendants, and the charge of the court thereon. The defendants introduced evidence, showing that the plaintiff's horse had been several times before in the highway, and with the knowledge and consent of the plaintiff. And the court were requested to charge the jury, "That if the plaintiff's horse, at the time of the injury, was in the highway with the knowledge and consent of the plaintiff, he could not recover."

It is very evident, that if the defendants are chargeable with gross, or any other degree of neglect, from their want of proper care in making and constructing their fences and cattle guards, arising from the consideration that they must have known and expected such casualties and injuries would arise, the plaintiff is chargeable at least with the same degree of neglect, in permitting his horse to run upon the highway, knowing of his exposure and liability to injuries of this character; and it is as reasonable to charge the plaintiff with the knowledge and expectation that such injuries would arise, as the defendants, and also to require of the plaintiff the ex-

Barre & Wyoming Valley Traction Co., 202 Pa. St. 365 (1902), and see *Hause v. Transit Co.*, 3 Lehigh County L. J. 42 (1910).

ercise of as much care and prudence in keeping his property from such exposure to such injuries, as is required of the corporation, in guarding against their commission. From the facts, therefore, in the case, the plaintiff was as much in fault and as equally chargeable with neglect, as the defendants; and in each case, their negligence was the remote cause of the injury, and equally contributed to that result.

This leads our investigation to the question, whether an action can be sustained, when the negligence of the plaintiff and the defendant has mutually co-operated in producing the injury, for which their action is brought. On this question, the following rules will be found established by the authorities. When there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained. In the use of the words "proximate cause," is meant negligence occurring at the time the injury happened. In such case no action can be sustained by either, for the reason, "that as there can be no apportionment of damages, there can be no recovery." So, where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, in such case no action can be sustained, for the reason that the immediate cause was the act of the plaintiff himself. Under this rule falls that class of cases, where the injury arose from the want of ordinary or proper care on the part of the plaintiff, at the time of its commission. On the other hand, when the negligence of the defendants is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England and this country. Therefore, if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant, in the exercise of reasonable care and prudence, an action will lie for the injury.¹ So in this case, if the plaintiff were guilty of negligence, or even of positive wrong, in placing his horse in the road, the defendants were bound to the exercise of reasonable care and diligence in the use of their road and management of the engine and train, and if for want of that care the injury arose, they are liable.

These principles have an important application to the case under consideration. The negligence, which caused the injury in this case, can not strictly be said to be proximate in either of the parties, but is remote, in both cases. It was remote on the part of the corporation; for it is found in the case, that there was no negligence on their part in the management of the train, or engine, when the injury arose, but the neglect existed in not having previously made their fences and cattle guards. It was also remote on the part of the plaintiff, in permitting his horse to remain in the highway, exposed to such injury, after it first came to his knowledge.

¹ See the very valuable and instructive opinion of Carpenter, J., in *Nashua Iron & Steel Co. v. Worcester & Nashua R. Co.*, 62 N. H. 159 (1882).

The injury arose from the combined result of both causes. If either of the parties had done their duty, and conformed to the requirements of the law, the injury would not have been sustained. In such case, no action can be sustained by either of the parties, no more than in the case, where their mutual negligence is the proximate cause of the injury; for the same reason exists in the one case, that exists in the other. From the nature of the case, there can be no apportionment of damages, and no rule can be laid hold of that settles what one shall pay more than the other. The rule is generally given in the authorities, that in cases of mutual neglect, where it is of the same character and degree, no action can be sustained.²

CAVANAUGH v. BOSTON & MAINE RAILROAD.

Supreme Court of New Hampshire, 1911. 76 N. H. 68.

Case, for negligence. Trial by jury and verdict for the plaintiff. Transferred from the January term, 1910, of the superior court by Pike, J.

Edith Bolis, the plaintiff's intestate, was killed by collision with the defendants' trains upon a highway grade crossing. At the time of her death she was about thirteen years old. She was driving alone in an open wagon, immediately following a carriage in which were three adults. She was driving slowly, would have seen the train if she had looked, and could have stopped within six feet of the crossing. The engineer testified that he saw the teams approaching the crossing when the train was about seventy-two rods and the forward carriage about eight rods distant therefrom; that the teams did not slacken their speed as teams usually do; that he sounded the whistle when he was forty or fifty rods from the crossing and continued to sound it until the team was struck; that when

² See *accord*: *Marriott v. Stanley*, 1 M. & G. 568 (1840). In *Stiles v. Geesey*, 71 Pa. 439 (1872), while the court stated broadly the Pennsylvania doctrine that the parties being mutually at fault there can be no recovery, neither party was, at any time after the peril could have been discovered, able to avert it, both having left their vehicles unattended. So where by reason of the defendant's antecedent negligence, the defendant, after discovering the peril to which the plaintiff has negligently exposed himself, is unable to avoid the accident, there can be no recovery, *Boston & Maine R. Co. v. McDuffey*, 79 Fed. 934 (1897); *Trigg v. Water, etc., Co.*, 215 Mo. 521 (1908), trains running at such excessive speed that they could not be stopped after the plaintiff was discovered on the tracks; *Owen v. Hudson River R. Co.*, 2 Bosw. 374 (N. Y. 1858), defective brakes; *contra*, *Baltimore Consolidated R. Co. v. Rifcowitz*, 89 Md. 338 (1899), excessive speed; *Neary v. Northern Pac. R. R.*, 37 Mont. 461 (1908); *Weitzman v. Nassau Elec. R. Co.*, 33 App. Div. 585 (N. Y. 1898); *Labarge v. Pere Marquette*, 134 Mich. 139 (1903), *semble*, explaining *Schindler v. Milwaukee, L. S. & W. R. Co.*, 87 Mich. 400 (1891), both cases where cars without lookouts were shunted over crossings.

If the defendant being present has the opportunity and duty to observe the plaintiff's helpless peril, he is liable though his failure to notice it was due to his attention being diverted by difficulties in his work caused by negligently bad equipment, *Springett v. Ball*, 4 F. & F. 472 (1865).

he failed to attract the attention of the travelers, he applied the brakes for an emergency stop, this being done when the train was about forty rods from the crossing. The teams drove upon the crossing, the first one clearing the locomotive. There was evidence tending to show that the whistle was not sounded nor the brakes applied until just before the crossing was reached, and that the train could have been brought to a full stop within 500 feet.

The defendants' motion for a nonsuit, on the ground that there was no evidence of care on the part of the plaintiff's intestate at the time of the accident, was denied, subject to exception. The only question submitted to the jury was the liability of the defendants under the principles of the "last clear chance" doctrine.

PARSONS, C. J. The remaining exception is to the denial of the motion for a nonsuit, which was asked upon the ground of the absence of any evidence of care on the part of the person injured. As the case is drawn, it may be inferred that the existence of evidence of the defendants' fault was conceded; but if such concession was not intended, this branch of the question requires little consideration. From the testimony of the engineer it could be found that he knew the teams were approaching the crossing in ignorance of the coming train, at a time when he could have given warning or applied the brakes in season to prevent a collision; and from all the evidence it might be found he did not do either until too late. What the facts were, and whether the engineer's failure to act was negligence causing the injury, were questions for the jury. The motion was properly denied if the jury could be permitted to find from the evidence of the conduct of the plaintiff's intestate, a girl of thirteen years, that she exercised such care as could reasonably be required of such a person under all the circumstances of the case; or if she did not, that the defendants' negligence, as distinguished from hers, was the sole proximate cause of the injury. The first question was not submitted to the jury, nor does the case disclose the form in which the second was presented to them.

Upon the evidence in the case, it was for the jury to say whether the exercise by the trainmen of such care as the circumstances required after the engineer discovered the deceased, would have prevented the injury. If it would, the failure to exercise such care was the sole proximate cause of the injury, although the danger was created by the deceased's negligent inattention to the situation. This has been held in several cases upon facts identical with those presented here (*State v. Railroad*, 52 N. H. 528; *Parkinson v. Railway*, 71 N. H. 28; *Little v. Railroad*, 72 N. H. 61; S. C., 72 N. H. 502; *Yeaton v. Railroad*, 73 N. H. 285; *Altman v. Railway*, 75 N. H. 573), and was conceded in *Stearns v. Railroad*, 75 N. H. 40, 46.

The danger may be created by the inattention of both parties, neither discovering the other until neither can avoid the resulting injury. In such cases the injury and the danger result from the same cause, the negligent inattention of both parties, and there can be no recovery. *Gibson v. Railroad*, 75 N. H. 342; *Batchelder v. Railroad*, 72 N. H. 528.

If the trainmen see the traveler approaching the crossing, there still may be no evidence upon which it can be found that they ought to have apprehended the traveler would go upon the crossing in advance of the train. *Gahagan v. Railroad*, 70 N. H. 441; *Waldron v. Railroad*, 71 N. H. 362. In these cases the plaintiffs fail, not because of their negligence, but because of the absence of negligence in the defendants. The traveler may be seen by the trainmen in the act of crossing, at a time when they can avoid the injury and the traveler can not. *Stearns v. Railroad*, 75 N. H. 40; *Yeaton v. Railroad*, 73 N. H. 285. The train may be discovered by the traveler at a time when he could avoid injury by care. In such case there can be no recovery, even if the railroad employees could have avoided the injury by like care. *Shannon v. Railroad*, 71 N. H. 286. The person injured may be incapable of taking care, and the railroad liable for negligent failure to discover him if they ought to have anticipated his presence in that condition. *Edgerly v. Railroad*, 67 N. H. 312.¹ Such a case does not differ from that of property negligently permitted by the owner to be or to go in the way of the train. *Laronde v. Railroad*, 73 N. H. 247. The traveler may be discovered by the trainmen on the crossing, or approaching it as in this case, under circumstances indicating inattention to the train or the crossing. In this situation, the cases cited hold that if ordinary men, with the information the trainmen have, would anticipate a collision at the crossing and avoid it, the trainmen's negligent failure to do so is the responsible cause of the injury. The rule of most general application deducible from the authorities is that the defendants are liable if, upon discovery of the danger, the plaintiff can not save himself, while the defendants upon their discovery of the danger could have avoided the injury. *Altman v. Railway*, 75 N. H. 573; *Little v. Railroad*, 72 N. H. 61; *S. C. 72 N. H. 502*; *Parkinson v. Railway*, 71 N. H. 28; *State v. Railroad*, 52 N. H. 523.

As the negligence of the party injured in failing to observe the approach of the train continues until the very moment of the accident, or at least until it is too late for either party to avoid the injury, and since he could have stopped in a place of safety after the time when the trainmen could have done anything to prevent the accident, it has been claimed that if his negligent failure to observe and stop is not subsequent to any negligence in the operation of the train, it is at least concurrent, and there can be no recovery. The conclusion that one conscious of danger of serious injury to a human being if he persists in the course which he is pursuing, which he can prevent by care, should be discharged from responsibility

¹So in South Carolina it is held that if the defendant knew of the plaintiff's peril or ought to have known of it in the exercise of care, his lack of subsequent care is the sole proximate cause of the resulting injury and therefore the plaintiff's antecedent negligence is not contributory, compare *Bodie v. Charleston & W. C. R. Co.*, 61 S. Car. 468 (1901), and *Harbert v. Atlanta & C. A. L. R. Co.*, 78 S. Car. 537 (1907)—see also *Righter v. Pennsylvania R. Co.*, 42 N. J. L. 180 (1880)—with *Jones v. Charleston & W. C. R. Co.*, 61 S. Car. 556 (1901).

because of negligent ignorance of the danger in the person injured, is so fundamentally unjust and contrary to natural reason that few cases are to be found that carry the logic of the rule of contributory negligence to that extent. With substantial unanimity, recovery is permitted in such cases, either upon the ground that the lack of attention in the party injured is not the proximate cause of the injury, or that the failure of the trainmen to act under such circumstances so far partakes of the nature of a wanton or intentional wrong that the law as to contributory negligence has no application.² *Murphy v. Deane*, 101 Mass. 455, 463; *Union Pacific Ry. v. Cappier*, 66 Kans. 649,—69 L. R. A. 516, note; *Dyerson v. Railroad*, 74 Kans. 528—7 L. R. A. (N. S.) 132, note; 1 *Thomp. Com. Neg.* s. 238; 2 *Id.*, s. 1598; *Cool. Torts* *674. It may be that neither explanation is strictly logical, and that the real foundation for the rule is merely its fundamental justice and reasonableness. The justice of the rule, that "the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the

²The defendant's failure to take steps to avoid injuring the plaintiff who is in a position of helpless peril is often spoken of as "wanton," "wilful," or "reckless," and this whether the defendant knows of such peril or ought to have knowledge of it, *Smith v. Norfolk & S. R. Co.*, 114 N. Car. 728 (1894); *Cole v. Metropolitan St. Ry. Co.*, 121 Mo. App. 605 (1906); *Rawitzer v. St. Paul City R. Co.*, 93 Minn. 84 (1904), but see *Anderson v. Minneapolis, St. P. & S. S. M. R. Co.*, 103 Minn. 224 (1908), and it is immaterial whether the defendant's subsequent fault is in taking no precautions or in taking insufficient steps to avert the accident, *Cole v. Metropolitan R. Co.*, 121 Mo. App. 605 (1906); *Ga. Pac. R. Co. v. Lee*, 92 Ala. 262 (1890), p. 270, where failure to "resort to all reasonable effort to avoid the accident" after knowledge of the peril, is held to imply "willingness to persist in a course of conduct which will naturally or probably result in disaster or an intent to perpetrate wrong;" and see *Birmingham Railway & Electric Co. v. Pinckard*, 124 Ala. 372 (1899), holding that "an honest employment of all available means to prevent the injury is essential" to rebut wantonness, "a partial employment of available means, evincing some degree of care is not enough."—p. 375.

An engineer is, however, entitled to assume, until the contrary appear, that one on or near the track will remove himself from his dangerous position and that he is using his senses to ascertain the necessity of so doing and while, if he is obviously unaware of the approach of the train, the engineer is bound to give warning signals to attract his attention, he is not bound to stop his train or reduce speed, unless such person is obviously incapable of protecting himself, being a child, or drunk, or deaf, etc., until it plainly appear that he intends to remain in his place of peril, see *Little Rock R. & Electric Co. v. Billings*, 173 Fed. 903 (1909), 31 L. R. A. (N. S.) 1031, with exhaustive note. So, too, the fact that a person apparently in full possession of his faculties is approaching the track is not enough to indicate that he will attempt to cross, if the approaching train is within his view, *Birmingham R. Co. v. Bowers*, 110 Ala. 328 (1895); *Denver & R. G. R. Co. v. Buffehr*, 30 Colo. 27 (1902); *Roanoke R. & Elec. Co. v. Carroll*, 112 Va. 598 (1911); *Backus v. Norfolk & Atlantic Terminal R. Co.*, 112 Va. 292 (1911), with which compare *Green v. Los Angeles Terminal R. Co.*, 143 Cal. 31 (1904), where the plaintiff was a pedestrian, with *Harrington v. Los Angeles*, 140 Cal. 514 (1903), where the plaintiff was a bicyclist racing toward the street railway crossing, *Rawitzer v. St. Paul City R. Co.*, 93 Minn. 84 (1904), bicyclist reading paper, and *Montgomery v. Lansing City Elec. R. Co.*, 103 Mich. 46 (1894), where the plaintiff was a member of a band, playing while marching down the street in front of the defendant's car.

consequences of the injured party's negligence." (*Grand Trunk Ry. v. Ives*, 144 U. S. 408, 429), may be a sufficient foundation for it.

Cases where at the time of the injury the plaintiff is not conscious of the danger in season to avert it, either because he is drunk,³

³ *Accord: McClanahan v. Vicksburg S. & P. R. Co.*, 111 La. 781 (1902); *McGuire v. Vicksburg, S. & P. R. Co.*, 46 La. 1543 (1894); *Murphy v. Wabash R. Co.*, 228 Mo. 56 (1910), especially pp. 81-83; *Pickett v. Wilmington & Weldon R. Co.*, 117 N. Car. 616 (1895), overruling *Smith v. Norfolk & S. R. Co.*, 114 N. Car. 728 (1894), *contra; Lloyd v. Albermarle etc. R. Co.*, 118 N. Car. 1010 (1896); and see *Little Rock etc. R. Co. v. Wilson*, 90 Tenn. 271 (1891), all cases where the defendants' negligence was a failure to observe the drunken plaintiff's helpless peril. See also, Ellsworth, J., in *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393 (1858), p. 404, and Blackburn, J., in *Radley v. London & N. W. R. Co.*, L. R. 10 Ex. 100 (1875), p. 103. "So in the case of a drunken man who might be lying on the highway, if any one carelessly driving on the road drove over him, he would have to pay damages, because the drunken man does not lose his right of action by his negligence."

It is generally held that where the defendant, knowing of the plaintiff's helplessly drunken condition, fails to exercise care to avoid injuring him, the plaintiff may recover though his drunkenness prevents him from taking that care of himself which if sober he could have and which would have saved him. In such cases the defendants' fault generally takes one of three forms, (1) a failure to stop a train or other vehicle in time, *St. Louis, I. M. & S. R. Co. v. Wilkerson*, 46 Ark. 513 (1885); *Georgia Southern & F. R. Co. v. George*, 92 Ga. 760 (1900); *Krenzer v. Pittsburgh C. C. & St. L. R. Co.*, 151 Ind. 587 (1898); *semble* (in both of which the defendant has received information which should have led it to expect the plaintiff's probable presence on its tracks); *Central R. Co. v. Glass*, 60 Ga. 441 (1878); *Cincinnati, I., St. L. & C. R. Co. v. Cooper*, 120 Ind. 469 (1889); but see *Visacchero v. Rhode Island Co.*, 26 R. I. 392 (1904)—(2) allowing the drunken passenger to ride in a place manifestly dangerous to one in his condition without warning him of the danger or removing him from the place or ejecting him from the train, *Wheeler v. Grand Trunk R. Co.*, 70 N. H. 607 (1901); but see *Fisher v. W. Va. & P. R. Co.*, 39 W. Va. 366 (1894), where it was held that warning the passenger of the danger of riding on the platform was a sufficient performance of their duty—(3) ejecting a helplessly drunken plaintiff from a train or premises at a place obviously dangerous to him because of his dangerous condition, though perhaps safe to one in full possession of his faculties, *R. Co. v. Valvelly*, 32 Ohio St. 345 (1877); *Black v. New York N. H. & H. R. Co.*, 193 Mass. 448 (1907). See, however, *Edgerly v. Union St. R. Co.*, 67 N. H. 312 (1892); *Keeshan v. Elgin A. & S. Trac. Co.*, 229 Ill. 533 (1907); *Bageard v. Consolidated Trac. Co.*, 64 N. J. L. 322 (1899), *Warren v. Pittsburgh etc. Ry.*, 243 Pa. 15 (1914), holding the railroad company not liable where a drunken passenger, expelled at a place reasonably safe for one of his condition, in his drunken wanderings stumbles into danger.

The plaintiff can not of course expect especial care unless his drunkenness is known to the defendant, *Strand v. W. M. R. Co.*, 67 Mich. 380 (1887).

On the other hand there is authority to the effect that where the defendant does not know of the plaintiff's peril, its alleged negligence consisting in a failure to discover it, the plaintiff's drunkenness or his deliberate lying down to sleep in a place of danger is a bar to his recovery, on the ground that his drunkenness or other involuntary incapacity does not excuse him from exercising that care for himself which he could and should have exercised if sober, he having, except for drunkenness, an opportunity of discovering the approach of the defendant's vehicle equal to that which those in charge thereof had to discover his helpless danger, *Little Rock R. & Elec. Co. v. Billings*, 173 Fed. 903 (C. C. A. 8th Circ. 1909); *Little Rock & Ft. Smith R. Co. v. Pankhurst*, 36 Ark. 371 (1880); *South Western R. Co. v. Hankerson*, 61 Ga. 114 (1878); *Houston & T. C. R. Co. v. Sympkins*, 54 Tex. 615 (1881); *Gulf, Colorado & S. F. R. Co. v. Matthews*, 32 Tex. Civ. App. 137 (1903); and see *Visacchero v. Rhode Island Co.*, 26 R. I. 392 (1904); *McKillop v.*

asleep, absorbed in introspection, or otherwise inattentive, while the defendant has knowledge of the danger, simply fall into the class where the defendant is present and the plaintiff is absent. They are governed by *Davies v. Mann*, 10 M. & W. 546. The result in that case would have been the same if the plaintiff had been asleep by the wayside within shouting distance of his donkey. The plaintiff's inability to control the situation is the test; and it is immaterial whether he is not in actual charge of the subject of injury because the absence of his body shows that he could not have been, or the fact be proved by showing that for other cause he, himself, was not in control. Whether under such circumstances the defendant, upon the information he has, ought to have known of the plaintiff's condition—that he was drunk, asleep, non-judging, or not observing—bears on the defendant's negligence. If it can not be found he ought to have known the plaintiff's condition, he is not liable; if he ought, he may be.

"The law no more holds one responsible for an unavoidable, or justifies an unavoidable, injury to the person of one who carelessly exposes himself to danger, than to his property similarly situated in his absence." The law deals with the behavior of the parties in the situation in which it finds them, regardless of how that situation was produced. If the two parties approach the point of collision asleep or inattentive, and neither wakes up or becomes alive to the situation, the concurrent negligence of both prevents a recovery from either; but if one wakes up, or becomes aware of the danger existing from the fact that another asleep or inattentive is thoughtlessly in danger of injury by him, his fault, if he can but does not avert the injury from such danger, is alone the cause of the subsequent injury. There is no difference between sailing the seas with a rudderless ship and traversing the highway with a rudderless mind. One knowing the situation, who can by care avert a collision and does not, is chargeable for the resulting loss, despite the uncontrolled character of the other's progress. *Nashua etc. Co. v. Railroad*, 62 N. H. 159.

The injury in this case arose because the defendants with their train and the deceased with her team both attempted to occupy at the same time a portion of a public highway which each had the right to use, but which neither had the right to occupy when it was in use by the other. Each was bound to such acts as would constitute care under the circumstances, to prevent an attempt at such joint occupation. While due care would ordinarily require that the

Duluth St. R. Co., 53 Minn. 532 (1893); *Ill. Cent. R. Co. v. Cragen*, 71 Ill. 177 (1873); and *Hoffman v. Peoria B. & C. Trac. Co.*, 164 Ill. App. 270 (1911), where, however, it did not appear that the defendant knew or should have known of the plaintiff's peril in time to have avoided injuring him.

It is of course clear that where the defendant is not present or able to control the course of events, the plaintiff's drunkenness does not excuse his negligence in running into a danger created by the defendant's negligence. *Woods v. Tipton County Board of Comrs.*, 128 Ind. 289 (1890); *Seymer v. Town of Lake*, 66 Wis. 651 (1886), plaintiff while drunk drove into a defect in a highway, *Berry v. Northeastern R. Co.*, 72 Ga. 137 (1883), plaintiff while drunk fell into a railway cutting.

wagon should wait and allow the train to go by, the failure to exercise such care and the negligent occupation of the crossing by the wagon gave the train no right to attempt to pass at the same time. *State v. Railroad*, 52 N. H. 528, 556; *Huntress v. Railroad*, 66 N. H. 185; *Gahagan v. Railroad*, 70 N. H. 441; *Little v. Railroad*, 72 N. H. 502, 503; *Continental Imp. Co. v. Stead*, 95 U. S. 161. Whether the use of the crossing at the time by the traveler was careful or negligent, the train could not lawfully use it while it was in use as a part of the highway. Having notice that the traveler was about to use it at a time when they could have refrained from entering upon it, they are as much in the wrong and as fully the sole authors of the resulting injury as the traveler would be who attempted to pass with knowledge that it was in use by the train.⁴

The situation is simply this: Both parties were proposing to exercise a common right which could not be enjoyed by both at the same time; the defendants knew of the deceased's proposed use; the deceased did not know the defendants' purpose. If the deceased was in fault for not knowing the defendants' desire then to pass over the crossing, the defendants were in fault for attempting to cross while the path was in use. As the deceased's negligent occupation of the crossing did not increase the defendants' right to use it, they can not recover of her for injury from their wrongful attempt, but must pay the damage done to her by their wrongful act. As her negligent act gave them no right to cross, it is immaterial in her suit for the injury whether her act of which they had notice was negligent or careful.

Exceptions overruled.

BINGHAM, J., *dissenting*.⁵

INDIANAPOLIS TRACTION & TERMINAL CO. v. CROLY.

Appellate Court of Indiana, 1911. 96 N. E. 973.

Appeal from the action of the Circuit Court of Morgan county in overruling a motion for a new trial after a verdict for the plaintiff and entering judgment thereon. The motion for a new trial was based *inter alia* upon the ground that the evidence was not sufficient to sustain the verdict of the jury and that the Judge had erred in his instruction to the jury.

LAIRY, J. In the application of (the doctrine of last clear chance) it must be borne in mind that a person who, by failure to use due care for his own safety, has exposed himself to danger, occupies a different position in the eyes of the law from one who is in the exercise of due care. To entitle him

⁴ Compare *Clay v. Wood*, *ante*.

⁵ Accord: *Borders v. Metropolitan R. Co.*, 168 Mo. App. 172 (1912); *De Lon v. Kokomo City St. R. Co.*, 22 Ind. App. 377 (1898); *Bruggeman v. Ill. Cent. R. Co.*, 147 Iowa 187 (1910); *Welsh v. Tri-City R. Co.*, 148 Iowa 200 (1910); *Wilson v. Illinois Cent. R. Co.*, 150 Iowa 33 (1911); *Goldrick v. Union R. Co.*, 20 R. I. 128 (1897); see *Rawitser v. St. Paul City R. Co.*, 93 Minn. 84 (1904); *contra*, *Everett v. Los Angeles R. Co.*, *Robards v. Trac. Co.*, *Drown v. R. Trac. Co.*, *Butler v. St. R. Co.*, note to *French v. R. Co.*, *ante*.

to recover, notwithstanding his want of care, it must appear that prior to his injury the company owed him a special and particular duty, the violation of which can be treated as the sole proximate cause of his injury.

There is a general duty resting upon a person in charge of a street car to use care to prevent injury to all persons and property with which it is likely to come in contact, and such care must be proportionate to the danger incident to its operation. This duty is a general one, and rests upon the motorman at all times and under all circumstances during the time he is operating such car; but the duty to take particular precautions to prevent injury to a particular person, who, by want of due care on his part, has exposed himself to immediate threatened danger, or is about to do so, is a special duty which arises out of the exigencies of the situation. It is the failure to discharge this particular duty which gives room for the application of the doctrine of last clear chance, by which the company, in such case, is held liable to a person, who, by want of due care, has exposed himself or his property to the danger of receiving such injury. The particular situation of the parties prior to the injury must be such as to give rise to this special duty to the particular person injured some appreciable time before the injury occurs.¹

From the very language in which the rule is generally expressed, it is apparent that, in order to hold a defendant liable by the application of the rule, it must appear from the evidence that such defendant's opportunity of preventing the injury was later in point of time than that of the plaintiff, and that such defendant failed to take advantage of the last clear chance. Where evidence in the case tends to show that the situation of the parties just prior to the injury was such that the defendant, by the exercise of due care, could have prevented it, and that the plaintiff could not, then the rule becomes applicable. If, however, the undisputed evidence shows that the opportunity of the plaintiff to avoid the injury was as late or later than that of the defendant, the rule can have no application, and the court should refuse to instruct upon the doctrine under consideration.

The weight of authority, as well as the better reason, supports the proposition that, in cases where the negligence of the plaintiff is antecedent to that of the defendant, and where such negligence of the plaintiff is deemed to have ceased prior to the injury, the plaintiff may recover by the application of the doctrine of last clear chance; and that it makes no difference, in such

¹ "As was said in the case of *Evansville & S. Traction Co. v. Spiegel*, 94 N. E. 718: "The first essential thing that the evidence must prove, or tend to prove, is that the decedent was in a situation of apparent and imminent danger at some appreciable time before the injury." The duty of exercising the particular precautions does not arise until the occasion which gives rise to such duty exists; but, when the occasion presents itself, the special duty at once arises, and continues until the time of the injury. From the time the emergency arises until the injury occurs, the motorman must use every reasonable means to prevent the threatened injury. If, during the time, he fails to use proper means to avoid the injury, the company will be held liable, or if his failure to avoid the injury during the time is due to the negligent rate of speed at which the car is running at the time the emergency arose, or to defective brakes or other negligence of the defendant, which prevented the motorman from avoiding the injury, when otherwise he could have done so, such negligence will be deemed to intervene, and will be held to be the sole proximate cause of the injury."

a case, whether the injury was caused by a negligent failure to discover plaintiff's danger, or by negligence in failing to use reasonable care to prevent the injury after discovering such danger.

In cases in which it appears that the plaintiff, without observing his surroundings, negligently goes upon the track of the defendant or in such close proximity to it as to expose himself to the danger of injury from a passing car, and where there is nothing to prevent him from observing his danger and avoiding the injury at any time before it occurs, and where it also appears that the motorman by reason of his negligence did not see the plaintiff or his danger in time to avoid the injury * * * the negligence of the plaintiff is concurrent and not antecedent, and the reason upon which the general rule is based can not apply. If the want of care on the part of the plaintiff consists in a failure to discover his own danger, and if the want of care on the part of the defendant consists of a like failure to observe the dangerous situation of the plaintiff, and if such want of due care on the part of both continues until the injury occurs, or becomes so imminent that neither can prevent it, the plaintiff can not recover. Under such circumstances, the opportunity of the plaintiff to observe the danger is equal to that of the defendant, and the duty to discover the danger and avoid the injury by the exercise of due care rests equally upon him and the defendant.² If the opportunity of the plaintiff to avoid the injury was as late as that of the defendant, how can it be said that the defendant had the last clear chance of avoiding it? The test is: What wrongful conduct occasioning the injury was in operation at the very moment it occurred or became inevitable? If, just before the climax, one party only had the power to prevent the injury, and he neglected to make use of it, the responsibility is his alone; but if each had the power to avoid such injury, and each failed to use it, then their negligence is concurrent, and neither can recover.

In this case it appears from the uncontradicted evidence that the plaintiff walked across the street in plain view of the approaching street car which was moving at a rapid rate of speed, and stepped upon the track only three or four feet in front of such moving car. If she had used due care to observe the approach of the car a moment before she stepped upon the track, she could have avoided the injury. Her negligence was concurrent and not antecedent, and therefore the doctrine of last clear chance, as applied to antecedent and subsequent negligence can have no application to this evidence.

There is at least one class of cases in which it has been held that an injured person may recover by the application of the doctrine of last clear chance, notwithstanding his own negligence continues up to the very time of the injury.

Where the motorman actually saw the person injured and realized, or should have realized, the peril to which he was exposed, or was about to expose himself, in time to have prevented the injury, * * * the special duty toward the particular person arises as soon as the motorman sees him under such conditions as would indicate to a person of ordinary prudence that he was in danger of being injured by the car, or was about to expose himself to such injury.³ It then becomes the special duty of the motorman to

² See *Consumer's Brewing Co. v. Doyle's Admx.*, 102 Va. 399 (1904), and *Bragg v. Cent. N. E. R. Co.*, 152 App. Div. 444 (N. Y. 1912).

³ "This, however, does not mean, as seems to be contended, that defend-

use every reasonable means to avoid injuring him; and, if he does not do so, the injured person may recover notwithstanding his want of care in failing to discover the approach of the car continued up to the very instant of the injury, and notwithstanding, also, that the plaintiff possessed the physical ability to have avoided the injury in case he had discovered his peril at any time before the accident happened. Cases of this kind frequently arise out of an injury to a person working, walking, riding, or driving upon the tracks of a street railway company, or out of an injury to a person who by reason of the abstracted condition of his mind, or by reason of his attention being diverted, or for some other reason, enters upon the track of such company, without observing his danger from approaching cars, and remains oblivious to such danger until he is struck and injured. In such a case the company may be properly held liable by an application of the doctrine of last clear chance, if there is evidence from which the jury may properly find that the motorman actually knew of the perilous situation of the person subsequently injured in time to have avoided the injury by the exercise of proper care. Under such a state of facts, the motorman possessed the physical ability to avoid the injury before the accident, and so also has the injured party. In this respect their chances are equal; but the motorman actually possesses the knowledge of the danger and appreciates the necessity of taking steps to avoid the injury, while the person injured has no actual knowledge of his danger, and does not appreciate the necessity of taking steps to avoid it.

The fact that the motorman sees, or otherwise has actual knowledge of, the dangerous situation in which the negligence of the plaintiff has placed him, and that he observes that the plaintiff is unconscious of his surroundings and oblivious of his danger, gives to such motorman the last clear chance of preventing the injury, and, in case he fails to take advantage of it, the plaintiff may recover. Some courts base the right of the plaintiff to recover in such a case upon a different ground, and assign as a reason that the conduct of the motorman, in failing to use proper means to stop the car after seeing the situation of the plaintiff and observing that he is not likely to escape injury, is of such a reckless, wanton, and wilful character that it amounts to constructive wilfulness, and that contributory negligence is not a defense to an action based on an injury so caused. *Krenzer v. Pittsburgh, etc., R. Co.*, 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252; *Smith v. Norfolk, etc., R. Co.*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287.

If there is some evidence in the record tending to prove that the motorman actually saw the plaintiff approaching the track and that her conduct and appearance at that time was such as to indicate that she did not observe the approach of the car and was oblivious of her danger, then the verdict can be sustained, even though her want of care in failing to see the car continued up to the time of her injury, provided that there is also evidence tending to prove that, after the motorman knew of her perilous situation, he had time to have avoided the injury by the exercise of due care.

The evidence upon this question is conflicting. From a consideration of

ant must know that the injury is inevitable if he fails to exercise care, and the decisions indicate no such requirement. It is enough that the circumstances of which the defendant has knowledge are such as to convey to the mind of a reasonable man a question as to whether the other party will be able to escape the threatened injury. One in such a situation is in a dangerous position."

the evidence, we can not say that the jury could not have properly found that the motorman knew of the danger to which plaintiff was about to expose herself in time to have prevented the injury. The evidence is sufficient to sustain the verdict.

Instruction No. 2 is inaccurate and erroneous for more than one reason. The jury are told by this instruction that, if either the motorman or conductor saw plaintiff and her peril, or could have seen it by the exercise of due care, and failed to stop the car and take other precautions to prevent injuring her, then they should find for the plaintiff, even though she was guilty of negligence in not looking out.

This instruction is defective because it fails to inform the jury that some appreciable space of time must have intervened after the motorman saw plaintiff's danger and before the injury occurred within which time some precaution could have been taken to prevent the injury.⁴ If, after discovering the peril to which the plaintiff was exposed, or was about to expose herself, the motorman could have prevented the injury by the exercise of proper care, it was his duty to do so; but from this instruction the jury would be warranted in finding against the defendant by an application of the rules of last clear chance, in case it found that the motorman saw the danger and peril of plaintiff and did not stop the car and prevent the injury, regardless of whether or not he had time to do so after discovering such peril and before the injury.

The instruction is erroneous for the further reason that it authorized a recovery in this case by the application of the doctrine of last clear chance in the event that the jury found that the motorman, by the exercise of ordinary care, might have discovered the plaintiff's peril in time to have prevented the injury, although he had no actual knowledge of such danger.

We can see no room for the application of the doctrine of last clear chance to a case where the failure on the part of the defendant to avoid the injury to plaintiff, after he had negligently exposed himself to danger, was due solely to the failure on the part of the motorman to observe plaintiff's danger, and where it also appears that the plaintiff's failure to avoid the injury resulted solely from a like want of care on his part in failing to observe his own danger, and where his opportunity of avoiding the injury was as late or later than that of the defendant. To apply the doctrine of last clear chance to a case of this kind would be either to make it an exception to the rule that contributory negligence of the plaintiff bars a recovery in an action based on negligence, or to hold that the negligence of the defendant in such a case is more culpable than that of the plaintiff, and thus recognize the doctrine of comparative negligence.

In this case, the facts bearing upon this question are undisputed, and but one reasonable inference can be drawn, and that is that the plaintiff's want of care continued up to the time of her injury. Her right to recover in this case, therefore, depended upon the question as to whether or not the

⁴ *Accord: Real Estate Trust & Ins. Co. v. Gwyn*, 113 Va. 337 (1912); *Purcell v. Chicago & N. W. R. Co.*, 117 Iowa 667 (1902); *Stewart v. Portland L. & P. Co.*, 58 Ore. 377 (1911), and see *Rider v. Syracuse Rapid Transit R. Co.*, 171 N. Y. 139 (1902).

motorman had actual knowledge of her danger in time to have avoided the injury.

The judgment is reversed, with directions to grant a new trial.^a

WEITZMAN v. NASSAU ELECTRIC R. R. CO.

Appellate Division of the Supreme Court of New York, 1898.
33 N. Y. App. Div. 585.

WOODWARD, J. The child was not killed by the original contact, as far as appears from the evidence, but was picked up on the fender and was carried a distance of from 32 to 150 feet, when he rolled off from the fender in front of the still advancing car, and was run over and killed, the car stopping

^a *Accord: Montgomery v. Lansing City Elec. R. Co.*, 103 Mich. 46 (1894); *Bedell v. Detroit Y. & A. R. Co.*, 131 Mich. 668 (1902), with which compare *Tunison v. Weadock*, 130 Mich. 141 (1902); *Harrington v. Los Angeles R. Co.*, 140 Cal. 514 (1903), and see *Texas & N. O. R. Co. v. McDonald*, 99 Tex. 207 (1905).

In the following cases it is held that the plaintiff may recover, notwithstanding his continuing ability down to the time of the accident to observe his peril and avoid the injury, by the exercise of due care and his continuing and concurring negligence in not doing so, though those in charge of the defendants' vehicle did not perceive his peril and realize his unconsciousness thereof, if by the exercise of the care, owing to him as a member of the public, they could have perceived and realized these facts, *Birmingham L. & P. R. Co. v. Brantly*, 141 Ala. 614 (1904); *Baltimore Trac. Co. v. Wallace*, 77 Md. 435 (1893); *Cons. R. Co. v. Rifcowitz*, 89 Md. 338 (1899); *Barrie v. St. Louis Transit Co.*, 102 Mo. App. 87 (1903); *Lassiter v. Raleigh & G. R. Co.*, 133 N. Car. 244 (1903); *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712 (1904); and see *dicta* in *Southern R. Co. v. Bailey*, 110 Va. 833 (1910).

This rule, often called the "humanitarian doctrine," is said by Goode, J., in *Hutchinson v. St. Louis & M. R. R. Co.*, 88 Mo. App. 376 (1901), to be "an exception to the law of contributory negligence" applied only "in controversies arising from injuries due to violent impacts and collisions" and "its real basis is to be sought in its supposed necessity for public security." It is, however, applied where the property and not the person of the plaintiff is injured, *Borders v. Metropolitan R. Co.*, 168 Mo. App. 172 (1912), coupe struck while attempting to cross track ahead of an oncoming car. For a vigorous attack on this rule, see the dissenting opinion of Woodson, J., in *Murphy v. Wabash R. Co.*, 228 Mo. 56 (1910).

But even in these jurisdictions, a plaintiff, who being fully aware of all the facts and as able to avoid the injury as the defendant, fails to look out for his own safety, *Watson v. Mound City St. R. Co.*, 133 Mo. 246 (1895), or deliberately takes a chance of crossing in front of a car which he knows is approaching, can not recover, *McNab v. United Rys. & Elec. Co.*, 94 Md. 719 (1902); *Meidling v. United Rys. & Elec. Co.*, 97 Md. 73 (1903); *Heying v. United Rys. & Elec. Co.*, 100 Md. 281 (1905).

In some jurisdictions the same result is reached by holding that one who is walking, riding, or driving along street railway tracks is not bound to continually look behind him to see whether a car is approaching, being entitled to rely upon the motorman giving him warning of his approach, *Fickett v. Lewiston A. & W. St. R. Co.*, 110 Maine 267 (1913); *Adams v. Camden & S. R. Co.*, 69 N. J. L. 424 (1903) and cases cited; or that one about to cross or turn into such a track is guilty of no negligence if he signals to the motorman his intention to cross at a public crossing while the car is far enough off to be stopped before striking him, *Polacci v. Interurban St. R. Co.*, 90 N. Y. S. 341 (1904). See also, *Conrad v. Elizabeth, P. & C. I. R. Co.*, 70 N. J. L. 676 (1904).

within its own length after the child had fallen. The learned trial court charged the jury that "the accident, if it happened, and the damage, if it was occasioned, and the actionable injury, if there is one, came at the time the railroad car struck his person, and no matter what happened afterwards, while that may have increased the injury, it has not increased the liability of the company. * * * The whole charge is negligence, and if the defendant was negligent and the plaintiff, or the child, was free from negligence at the time the actual collision occurred, you are not to render a verdict in this case because of another negligence which you may find the motorman committed after the actual collision. Their right of action was made out then, if it was made out at all, and there can be no case here of the picking up of the child upon the fender giving a right of action, or a right of action arising by reason of something that occurred afterwards; that would be entirely illegal, and you must dismiss it from your minds." In this we are of opinion the trial court was in error.

Conceding that the plaintiff's intestate was *sui juris*, and that he was, as a matter of law, guilty of contributory negligence in stepping upon the track of the defendant at the same moment that the car arrived at the point of contact, the evidence in the case shows that the child was not killed by the original impact, but that he was picked up on the fender and carried a considerable distance, when he finally rolled off and was crushed under the wheels. To say that the defendant owed this child no duty; that it is responsible for no degree of negligence on the part of its servants after it had struck the child and failed to kill him, is to utterly mistake the policy and the rules of law. Whatever may have been the duties or obligations of the parties up to the moment that the child was picked up on the fender, there can be no question as to the obligation of the defendant after the feat had been accomplished, and a failure to discharge that obligation was negligence, to which the child, under the circumstances, could not contribute. It was the duty of the defendant, as we have already pointed out, to equip its cars in such a manner as to reduce to a minimum the chances of accident. The duty to equip the cars with fenders carries with it the duty to so operate them as to accomplish the end for which they are designed, and a human being, having been gathered into one of those fenders, no matter by what degree of negligence on his part, imposes upon the defendant the immediate duty of so operating the car as to afford him an opportunity to be taken from his dangerous position. Whatever the degree of negligence on the part of the individual in the original contact, that negligence culminated in the accident which landed him in the net of the fender. From that moment a new relation existed between the parties, and any act or omission on the part of the defendant amounting to a lack of the care demanded by the situation and resulting in the death of plaintiff's intestate, is sufficient to charge the company with negligence. It is not to be understood that the defendant becomes an insurer of every person who is caught in its fender, but simply that it is bound to use that same degree of care which a reasonably careful and prudent man would, or ought to use under the same circumstances, and this is always a question for the jury to pass upon. When the plaintiff's intestate reached a place upon the fender of defendant's car, the defendant had notice that the child was in a dangerous position, and if it had time, and with the exercise of reasonable care could have prevented the injury or death of the

child, it was its duty to do so, and a failure on its part was negligence which entitled the plaintiff to recover, and the question of whether the defendant did or did not discharge this duty should have been submitted to the jury. The rule of law is that, "notwithstanding negligence upon the part of the person injured, he may recover if the railway company, after such negligence occurred, could, by the exercise of ordinary care, have discovered it in time to have avoided inflicting the injury." (7 Am. & Eng. Ency. of Law (2d ed.), 437.)¹

GEORGE W. WHEELER, JR., dissenting in *Nehring v. Connecticut Co.*

Supreme Court of Errors of Connecticut, 1912. 86 Conn. 109.

In each case of discovered peril caused by one's negligence the question is, did the defendant have the opportunity after such discovery, and was it his duty, to have avoided the accident? Whether the conduct of the motor-man was gross negligence, or ordinary negligence, the breach of duty was the same in kind, though differing in degree. If one walks upon a railroad track drunk, or in a reverie, or otherwise careless; or if one stands or lies on or so near the railway track as to be in danger and unconscious of it; or if one is in a position of peril through his own negligence from which he is unable to extricate himself, the person knowing or having the means and the duty to know of his presence owes him the duty of avoiding injuring him. One who is negligently in a position of danger and unconscious of it is in

¹ *Accord: Green v. Metropolitan R. Co.*, 42 N. Y. App. Div. 160 (1899). The New York cases are in great confusion, the general tendency being toward regarding the plaintiff's negligence as a bar, unless the defendant was guilty of some new act of negligence on the part of the defendant occurring after the plaintiff's negligence had culminated in placing him in helpless peril, *Rider v. Syracuse Rapid Transit R. Co.*, 171 N. Y. 139 (1902). But the decisions do not clearly show what is such a new act of negligence and whether the defendant's knowledge of the plaintiff's peril is essential or not. In *Costello v. Third Ave. R. Co.*, 161 N. Y. 317 (1900), the motorman accelerated the speed of his car without looking ahead, when, if he had done so, he would have seen the plaintiff trying to cross; however, this case might well have been decided in the plaintiff's favor on the ground that he could have crossed safely but for the acceleration which he had no reason to expect and that therefore his attempt to cross was not negligent at all. Nor is it clear when a new situation arises which creates a new situation in which the defendant's inaction amounts to a new act of negligence, compare with the principal case *Rider v. Syracuse Rapid Transit R. Co.*, 171 N. Y. 139 (1902), in which the court refused to regard the pushing of the plaintiff's wagon along the track for twenty feet after the collision, so overturning it and injuring him, as a new act of negligence.

As to whether knowledge of or duty to know, plaintiff's helpless peril makes subsequent inaction a new act of negligence, compare *W'asmer v. R. R.* 80 N. Y. 212 (1880), *McKeon v. The Steinway R. Co.*, 20 App. Div. 601 (N. Y. 1897), and *Tatarella v. N. Y. & Queens County R. Co.*, 53 App. Div. 413 (N. Y. 1900) with *Bortz v. Dry Dock E. B. & B. R. Co.*, 79 N. Y. 1046 (1903) and *McDonald v. Metro. R. Co.*, 87 N. Y. S. 699 (1904); see also, *Csatlos v. Metro. St. R. Co.*, 70 App. Div. 606 (N. Y. 1902), where the driver unsuccessfully did all he could after the plaintiff's peril was discovered, but it was contended that had the brake been in good order he could have stopped, with which compare *Green v. Erie R. Co.*, 11 Hun 333 (N. Y. 1877).

no different situation than if he were incapable of extricating himself from his peril.¹

The opinion of the court classifies in five groups the several kinds of cases which have been thought to be within the "last clear chance" doctrine. In group one, the defendant, instead of doing his duty, does something which is a new act of negligence.² In group two, the peril is one from which the plaintiff can not, or can not reasonably, extricate himself. Each group supports a recovery. In group three, means of escape were open to the plaintiff down to the accident, but he remained unconscious of his peril. The opinion holds that if the plaintiff remains passive after exposing himself to peril and does nothing to materially change that condition, there may be a recovery.³ But in group four, assuming the same facts as in group three, the court holds that if the plaintiff after exposing himself to peril, instead of permitting the fixed condition to remain unchanged continues as an active agent in producing the condition under which the injury was received down to its occurrence, or until it was too late for the defendant to avoid the accident, there can be no recovery. In group five, the defendant knows, or ought to know, that the injured one is careless and is about to expose himself to danger of which he is unconscious, and after such knowledge he has the opportunity to avoid injury to him, and in such case the court holds there can be no recovery.

We have attempted to show that the breach of duty of the defendant in each of these several groups is the same, and was a new act of negligence of the defendant, viz.: the failure of the defendant to avoid injuring the plaintiff after he knew of his peril when he was either unconscious of it or incapable of extricating himself from it, and that this breach was the proximate cause of the accident while the plaintiff's prior negligence was the remote cause.

The distinction between active and passive negligence made in groups three and four, is new to our law, as well as to the law of negligence generally prevailing in this country and in England. On analysis it does not

¹ The plaintiff was struck by one of the defendants' cars as he stepped on its street railway tracks. The evidence showed that the plaintiff, without looking to see whether a car was approaching, started to cross the defendants' street railway tracks at an oblique angle with his back half turned to the car, which ran him down just as he stepped on the track. The street was clear of obstructions and his conduct and obvious unconsciousness of danger were plainly observable by the motorman though there was no direct evidence that the motorman actually saw him. The majority of the court, G. W. Wheeler and R. Wheeler, JJ., dissenting, held that a verdict was rightly directed for the defendant, since the plaintiff was "not merely passively permitting an already fixed condition to remain unchanged" but when injured was "an actor on the scene" who "by his own volition" "brings into the situation which confronts the defendant changed conditions" and so his conduct is "a concurring efficient cause" and his negligence being contributory, he could not recover unless the defendants' conduct is "open to the charge of wilfulness or wantonness."

² *Smith v. Conn. R. & Lighting Co.*, 80 Conn. 268 (1907), the defendants' motorman said the plaintiff was about to cross the track, in negligent oblivion that the car was only a short distance away, he tried to stop the car, but being inexperienced became confused and instead accelerated its speed, causing the collision in which the plaintiff was injured.

³ As in *Nichols v. Conn. Co.*, 83 Atl. 1022, 85 Conn. 710 (1912).

seem logical. A is crossing a trolley track when hailed by a friend; he stops upon the track to talk and negligently fails to use his senses to discover an approaching car. The motorman could have seen A in his place of peril, unconscious of his danger, and in time, with the exercise of reasonable care, to have avoided injuring him; instead he drives on his car and kills A. The opinion would hold A negligent in being upon the track without using his senses to keep out of the way of the oncoming car, but that as he remained passive and did nothing to change his situation of peril after the motorman had the opportunity to have avoided the accident, he may recover. But if A, instead of stopping on the track had gone on his way across or upon the track and had been struck, his negligence would have been active and continued to the accident and would have been concurrent with that of the motorman. It must be considered that the breach of the motorman's duty would have been the same in each case: a failure to use reasonable care to avoid the accident. We see no reason why it should be available in the one case and not in the other. In neither case has the plaintiff's negligence changed. It never became passive or nonexistent. It remained to the time of the accident. It ceased, in a legal sense, to be a proximate cause of the accident. A was relieved of its consequences because the negligence of the motorman in failing to avoid the accident intervened and became its proximate cause. If this distinction holds, and A be upon a trolley track intoxicated and asleep, his negligence is passive; if awake and walking his negligence is active.*

SECTION 4.

Contributory Negligence of Persons Other Than the Plaintiff (Imputed Negligence).

THOROGOOD v. BRYAN.

Court of Common Pleas, 1849. 8 Manning, Granger & Scott, 115.

COLTMAN, J. The case of *Thorogood v. Bryan* seems distinctly to raise the question whether a passenger in an omnibus is to be considered so far identified with the owner, that negligence on the part of the owner or his servant is to be considered negligence of the passenger himself. As I understand the law upon this subject, it is this,—that a party who sustains an injury from the careless or negligent driving of another, may maintain an action, unless he has himself been guilty of such negligence or want of due care as to have contributed or conduced to the injury. In the present case, the negligence that is relied on as an excuse, is, not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me, that, having trusted the

* Compare *Baltimore Trac. Co. v. Wallace*, 77 Md. 435 (1893), holding that the defendants' duty is the same whether the plaintiff is upon or approaching the tracks, if his unconsciousness of danger is or ought to have been observed.

party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that, if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury.

MAULE, J. On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that can not with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. According to the terms of his contract, he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey. But, as regards the present defendant, he is not altogether without fault.

He chose his own conveyance, and must take the consequences of any default of the driver whom he thought fit to trust.

CAHILL v. CINCINNATI &c. RAILWAY CO.

Court of Appeals of Kentucky, 1891. 92 Ky. 345.

LEWIS, J. Another question argued by counsel is whether negligence on the part of Henry Conrad,¹ assuming it to be proved, can be imputed to plaintiff in bar of recovery. The general rule, as settled by this court, is that when an injury is occasioned by concurrent negligence of two persons the fault of one is no excuse for the other, but both are liable to the party injured. (*Danville, &c., Turnpike Road Co. v. Stewart*, 2 Met., 119; *Louisville, &c., R. Co. v. Case*, 9 Bush, 720.) In both those cases the plaintiff was a passenger in a public conveyance.² But the conditions upon which

¹ Henry Conrad owned and was driving the buggy in which the plaintiff was being driven when injured.

² The courts, both state and Federal, of the United States are practically unanimous in holding that the negligence of a common carrier will not preclude recovery by a passenger thereof against a third party whose negligence concurs with that of the carrier in causing the passenger's injury, *Bunting v. Hoagsett*, 139 Pa. St. 363 (1890), overruling *Lockhart v. Lichtenthaler*, 46 Pa. 151 (1863), which had imputed the contributory negligence of a common carrier to a passenger on grounds of public policy, (i. e., that the carrier's sole responsibility was an incentive to care and diligence), while refusing to impute the negligence of the driver of a private vehicle to an occupant thereof; *Wabash, St. Louis & Pac. R. Co. v. Shacklet*, 105 Ill. 364 (1883); *Kuttner v. Lindell R. Co.*, 29 Mo. App. 502 (1888); *Bennett v. N. J. R. & T. Co.*, 36 N. J. L. 161 (1873); *Chapman v. New Haven R. Co.*, 19 N. Y. 341 (1859); *Transfer Co. v. Kelly*, 36 Ohio St. 86 (1880); *Carlisle v. Brisbane*, 113 Pa. St. 344 (1886); *Cuddy v. Horn*, 46 Mich. 596 (1881), and see *Prideaux v. Mineral Point*, 43 Wis. 513 (1878). Nor will the contributory negligence of the driver of a hired vehicle, whether hired at a public stand, a livery stable or by any other special contract, be imputed to the hirer, *Little v. Hackett*, 116 U. S. 366 (1886); *Randolph v. Riordon*, 155 Mass. 331 (1891); *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161 (1885); and see the very exhaustive note to *Schultz v. Old Colony St. R. Co.*, 8 L. R. A.

contributory negligence of one of such persons can be imputed to the plaintiff in an action against the other, as held in the latter case, are that he must have then been the agent or servant or subject to the government or control of the plaintiff. It does not therefore seem to make any difference in such case whether the party injured was at the time a passenger in a public conveyance paying his fare, or riding in a private vehicle free of charge at invitation of the owner and driver; but the true test is whether his relation to the person whose negligence is sought to be imputed to him was such as would have rendered him liable in case another than himself had been injured by such concurrent negligence. For to defeat an action of a party injured by showing contributory negligence of another, or to render him liable for that other person's negligence, not being himself in fault, either the maxim *qui facit per alium, facit per se* must apply—that is, the relation of master and servant² or principal and agent must exist—or else that they were engaged in a joint enterprise whereby mutual responsibility for each other's acts existed, which was clearly not the case.

Robinson v. New York, &c., R. Co., 66 N. Y. 11, was the case, like this in every respect, of a female who, while riding in a buggy at the invitation of a young man, the owner and driver, was injured by collision with a railroad train, and in discussing the same question we are now considering, Church, C. J., said: "I am unable to find any legal principle upon which to impute to the plaintiff the negligence of the driver. * * * The acceptance of an invitation to ride creates no more responsibility for the acts of the driver than the riding in a stage-coach, or even a train of cars, providing there was no negligence on account of the character or condition of the driver, or of the safety of the vehicle, or otherwise. It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury, for whose acts the plaintiff was not responsible."

It is true a passenger in a public as well as a private vehicle may, by his own negligence, contribute to its collision with another vehicle whereby he is injured. But the question before us is not whether the plaintiff in this case was negligent, but whether the assumed negligence of the owner and driver of the buggy she was in can be imputed to her. The distinction is recognized even in the case cited, and, although it is there said a person carried in a private conveyance is responsible for his own negligence, yet it is distinctly held that negligence of the driver can not be imputed to him any more than that of a common carrier can be to his passenger.

It seems to us there is no authority or sound reason for imputing to the plaintiff in this case the negligence of Henry Conrad,

(N. S.) 597, where the American authorities up to 1906 on the whole subject of the "imputed negligence of driver to passenger" are collected.

²In *Lundergan v. New York Central & Hudson River R. Co.*, 203 Mass. 460 (1909), Justice Sheldon gave as one reason for holding that the plaintiff is barred by the negligence of the driver, the fact that the relation of master and servant existed between them, though in fact the injured plaintiff was the servant and the negligent driver was the master.

if he was guilty of any, in the absence of evidence that she voluntarily accepted his invitation knowing him to be incompetent and unreliable, or that she instead of him did actually control and direct the movement of the buggy.⁴

Wherefore the judgment is reversed for a new trial consistent with this opinion.

⁴ *Accora*: *Pyle v. Clark*, 75 Fed. 644 (1896); *Elyton Land Co. v. Minge*, 89 Ala. 521 (1889); *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572 (1904); *Colorado & So. R. Co. v. Thomas*, 33 Colo. 517 (1905); *Roach v. Western & Atl. R. Co.*, 93 Ga. 785 (1894); *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 492 (1890); *Christy v. Elliott*, 216 Ill. 31 (1905); *Knightstown v. Musgrove*, 116 Ind. 121 (1888); *Nesbit v. Garner*, 75 Iowa 314 (1888); *Leavenworth v. Hatch*, 57 Kans. 57 (1896); *State of Maine v. Boston & M. R. R. Co.*, 80 Maine 430 (1888); *Shults v. Old Colony St. R. Co.*, 193 Mass. 309 (1906); *Koplitz v. St. Paul*, 86 Minn. 373 (1902); *Marsh v. Kansas City So. R. Co.*, 104 Mo. App. 577 (1904); *Noyes v. Boscawen*, 64 N. H. 361 (1887); *Noonan v. Consolidated Trac. R. Co.*, 64 N. J. L. 579 (1900); *Masterson v. New York Central & H. R. R. Co.*, 84 N. Y. 247 (1881); *Brickell v. New York C. & H. R. R. Co.*, 120 N. Y. 290 (1890); *Street R. Co. v. Eadie*, 43 Ohio St. 91 (1885); *Carlisle v. Brisbane*, 113 Pa. St. 544 (1886); *Carr v. Easton*, 142 Pa. St. 139 (1891); *Wilson v. New York, N. H. & H. R. Co.*, 18 R. I. 589 (1894); *Galveston, H. & San Antonio R. Co. v. Kutac*, 72 Tex. 643 (1889).

In Michigan an adult who voluntarily enters a private vehicle is so far identified with the driver as to be barred by his contributory negligence, *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274 (1872); *Mullen v. City of Owosso*, 100 Mich. 103 (1894), though an infant not *sui juris* is not, *Hempel v. Detroit, G. R. & W. R. Co.*, 138 Mich. 1 (1904); nor is a passenger identified with those in charge of the vehicle of his common carrier. In Wisconsin and Montana, a guest in a private conveyance is so identified with driver, *Prideaux v. Mineral Point*, 43 Wis. 513 (1878); *Lightfoot v. Winnebago Trac. Co.*, 123 Wis. 479 (1905); *Whittaker v. Helena*, 14 Mont. 124 (1894), though there are intimations in *Prideaux v. Mineral Point* which is quoted and followed in *Whittaker v. Helena*, that no such identification exists between a passenger and the servants and agents of a common carrier.

It is generally held that the guest is no more barred by the contributory negligence of a driver who is the husband, son or other relative of such guest, than if he were not so related, *Louisville, N. A. & C. R. Co. v. Creek*, 130 Ind. 139 (1891); *Reading v. Telfer*, 57 Kans. 578 (1897); *Whitman v. Fisher*, 98 Maine 575 (1904); *Teal v. St. Paul City R. Co.*, 96 Minn. 379 (1905); *Munger v. Sedalia*, 66 Mo. App. 629 (1896); *Hajsek v. Chicago, B. & Q. R. Co.*, 68 Nebr. 539 (1903); *Hoag v. New York C. & H. R. R. Co.*, 111 N. Y. 199 (1888); *Davis v. Guarnieri*, 45 Ohio St. 470 (1887); *Buckler v. Newman*, 116 Ill. App. 546 (1904), woman driving with minor son, see *Watson v. Wabash, St. L. & Pac. R. R.*, 66 Iowa 164 (1885); *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149 (1886); *Cons. Trac. Co. v. Behr*, 59 N. J. L. 477 (1896), and *Duval v. Atlantic Coast Line*, 134 N. Car. 331 (1904), daughters driven by their fathers; *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149 (1886); *Petersen v. St. Louis Transit Co.*, 199 Mo. 331 (1906), uncle and nephew of sixteen. As to the effect of negligence of a father driving his minor child in those jurisdictions which hold that the child, being incapable of caring for itself, is barred by the negligence of those in charge of it, compare *Hennessey v. Brooklyn City R. Co.*, 6 (N. Y.) App. Div. 206 (1896) with *Delaware, L. & W. R. Co. v. Devore*, 114 Fed. 155 (52 C. C. A. 77 1902), and see *Peabody v. Haverhill, G. & D. St. R. Co.*, 200 Mass. 277 (1908).

On the other hand a husband's negligence is held in some cases to defeat the wife's action against a third party whose negligence concurs with it to cause her injuries. In *McFadden v. Santa Ana, O. & L. St. R. Co.*, 87 Cal. 464 (1891) and *Pennsylvania R. Co. v. Goodenough*, 55 N. J. L. 577 (1893), the reason given was the husband's interest in the wife's right of action, the necessity of his joinder therein and his right to the judgment recovered. In

COTTON v. WILLMAR & SIOUX FALLS RY. CO.

Supreme Court of Minnesota, 1906. 99 Minn. 366.

Action to recover for personal injuries.

This appeal is brought from an order of the district court denying a motion for judgment notwithstanding the verdict rendered in favor of the plaintiff (or for a new trial).

ELLIOTT, J. On the evening of December 21, 1905, the plaintiff Cotton engaged from a livery stable, a single seated, two horse buggy and a driver to take him from Bell's Rapids, South Dakota, to Jasper, Minnesota. The driver was nineteen years of age and was experienced and was familiar with the route. By the time they reached their destination it was dark and the street lamps were lighted. The street by which they entered the village crossed at right angles with the defendants' tracks. When the team was between fifty and seventy rods from the track both driver and plaintiff heard the whistle of a locomotive. They continued on at a brisk pace until they reached a point about a hundred feet from the track where the team was brought to a walk and the plaintiff got out and listened for the train, as did also the driver. It does not appear that the driver saw anything or made any remark. The plaintiff saw a light some six hundred feet up the track to the north and supposed it to be the locomotive which had whistled and said "There is the headlight." Assuming apparently that they had thus ample time to pass over the crossing before the train would reach it, both parties settled back in their seats and the driver whipped up the horses and drove rapidly upon the track. They were there struck by a train which came from the south and which must have been hidden by a station building at the time when the plaintiff and driver looked for the train. The respondent sustained injuries for which he recovered a verdict for \$5,000. This appeal is from an order denying a motion by the defendant for judgment notwithstanding the verdict (or for a new trial).

The American courts have very generally declined to approve the doctrine of *Thorogood v. Bryan*, 8 M. G. & S. 115, but have not been able to agree upon the extent of the duty which rests upon a person who rides in a vehicle which is driven by a person over whom he has no direct control. *Bennett v. New Jersey*, 36 N. J. L. 225, 13 Am. Rep. 435; *New York v. Steinbrenner*, 47 N. J. L.

Joliet v. Seward, 86 Ill. 402 (1877) and *Yahn v. Ottumwa*, 60 Iowa 429 (1883), as explained in *Nesbit v. Garner*, 75 Iowa 314 (1888)—but see *Willfong v. Omaha & St. L. R. Co.*, 116 Iowa 548 (1902)—the reason given was that the wife is, by virtue of the marital relation, under the husband's care, while in *Carlisle v. Sheldon*, 38 Vt. 440 (1866) the rule in *Thorogood v. Bryan*, which at that time was accepted by the court, was held to apply none the less because the driver was her husband.

In *Contos v. Jamison*, 81 S. Car. 488 (1908), it was held that a lessee was not barred from recovery for injuries to the property leased, by the contributory negligence of his lessor.

161, 54 Am. Rep. 126; *Becke v. Missouri*, 102 Mo. 544, 548, 13 S. W. 1053, 9 L. R. A. 157.

One group of cases charges the passenger with the absolute duty of keeping a lookout for his own safety, and does not permit him to trust to the care of the driver,¹ while another allows him to rely upon a driver, whom he believes to be careful and competent, without being subject to the implication of negligence. 2 Thompson, Neg. § 1621, and cases there cited. But the rule which has met with general approval in the more recent cases makes the passenger responsible only for his personal negligence, and leaves it to the jury to determine whether, under the circumstances, he was justified in trusting his safety to the care of the driver and not looking and listening for himself. The negligence of the driver is thus not imputed to the guest or passenger, but the circumstances may be such as to make it the duty of the passenger to look and listen and attempt to control the driver for his own protection. The passenger is thus held responsible for his own negligence but not for the negligence of the driver. He must exercise due care and

¹ Many jurisdictions hold that one, being driven gratuitously or for hire in a vehicle (other than that of a common carrier—when he may rely upon the vigilance and care of those employed to operate it, *O'Toole v. Pittsburgh & L. E. R. Co.*, 158 Pa. St. 99 (1893)—must, unless his position in the vehicle absolutely prohibits it—as in *Sluder v. St. Louis Transit Co.*, 189 Mo. 107 (1905)—keep a lookout for expectable dangers and must warn the driver thereof and insist upon his using due care to avoid them, stop and allow him, the plaintiff, to get out, *Dean v. Pennsylvania R. Co.*, 129 Pa. St. 514 (1889), plaintiff knew that the vehicle was approaching a level railway crossing but sat with his back to the driver and did not warn the driver nor request him to stop and look and listen for the approach of a train which he knew to be about due to pass; *Dryden v. Pennsylvania R. Co.*, 211 Pa. St. 620 (1905); *Colorado, etc., R. Co. v. Thomas*, 33 Colo. 517 (1905); *Lake Shore & M. S. R. Co. v. Boyls*, 16 Ind. App. 640 (1901); *Holden v. Missouri R. Co.*, 177 Mo. 456 (1903); *Hajsek v. Chicago, B. & Q. R. Co.*, 5 Nebr. (unofficial) 67 (1903), 97 N. W. 327; *Brickell v. New York Cent. & H. R. R. Co.*, 120 N. Y. 290 (1890); *Galveston, Harrisburg & San Antonio R. Co. v. Kulac*, 72 Tex. 643 (1889); *Griffith v. Baltimore & Ohio R. Co.*, 44 Fed. 574 (1890), affirmed 159 U. S. 603 (1895).

In all of these cases the plaintiff had an opportunity and power equal to that of the driver to observe and avoid the peril which injured him. In *Lundergan v. New York etc. R. R.*, 203 Mass. 460 (1909), the doctrine seems to be carried to its extreme as the plaintiff and the driver arranged to look each in one direction along the double tracks of the railway which they were about to cross, a procedure which, while constituting on the part of each "a voluntary surrender of the other of all care against all danger coming from the side for which the other made himself responsible," would seem to be one well calculated to insure the discovery of any train approaching in either direction.

In some of the Massachusetts cases it is held that when the passenger or guest trusts to the driver the sole care and management of the vehicle and relies entirely on such care, *Murray v. Boston Ice Co.*, 180 Mass. 165 (1901), or there is on his part a "voluntary, unconstrained and non-contractual surrender of all care for himself to the caution of the driver". *Shultz v. Old Colony St. R. Co.*, 193 Mass. 309 (1907) 323; *Yarnold v. Bowers*, 186 Mass. 396 (1904), *Lundergan v. New York Cent. & H. R. R. Co.*, 203 Mass. 460 (1909), he is barred by the driver's negligence.

caution, and, if his negligence contributes approximately to the accident, he can not recover damages.²

In *Illinois v. McLeod*, 78 Miss. 334, it was said that, where the danger is apparent, the passenger is chargeable with the duty of taking some action to control the conduct of the driver.³ In *Township v. Anderson*, 114 Pa. St. 643; and *Dean v. Pennsylvania*, 129 Pa. St. 514, it was held that where the danger is obvious or the passenger has knowledge of its existence, he is chargeable with negligence. In *Dryden v. Pennsylvania*, 211 Pa. St. 620, it was said that the immunity of the passenger "is not absolute to the extent of excusing reasonable caution in the face of patent danger." A passenger certainly would be negligent if he relied on a driver who was known to be intoxicated or otherwise incompetent. *Roach v. Western*, 93 Ga. 785; *Meenagh v. Buckmaster*, 26 App. Div. 451.⁴ Many other cases might be cited to illustrate the rule that a guest or passenger riding in a vehicle with a driver, over whose conduct he has no rightful control, is required, nevertheless, to exercise reasonable care for his own safety.

In *Howe v. Minneapolis, St. P. & Sault Ste. M. Ry. Co.*, 62 Minn. 71, the court said: "We think that it would hardly occur to a man of ordinary prudence when riding as a passenger with a competent driver, whom he had no reason to suppose was neglecting his duty, that he was required when approaching a railway crossing to exercise the same degree of vigilance in looking and listening for approaching trains that he would if he himself had the control and management of the team, and our conclusion is that a court can not hold, as a matter of law, that a passenger having

² Citing "*West Chicago St. R. Co. v. Piper*, 165 Ill. 325, 46 N. E. 186; *Missouri, K. & T. R. v. Bussey*, 66 Kans. 735, 71 Pac. 261; *Whitman v. Fisher*, 98 Maine 575, 57 Atl. 895; *Indianapolis St. R. Co. v. Johnson*, 163 Ind. 518, 72 N. E. 571; and cases collected in a note to *Colorado & S. R. Co. v. Thomas* (33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681), 3 Am. & Eng. Ann. Cas. 703."

See also, *Chadbourne v. Springfield St. R. Co.*, 199 Mass. 574 (1908); *Carr v. Easton*, 142 Pa. St. 139 (1891); *Walsh v. Altoona & L. V. Elec. R. Co.*, 232 Pa. St. 479 (1911); *Wachsmith v. Baltimore & Ohio R. Co.*, 233 Pa. St. 465 (1912).

³ Where the plaintiff knows of the danger as fully as the driver and without protest allows him to encounter it, he is taken to be guilty of personal negligence or, perhaps more exactly, to assume the risk of injury from the danger which thus he joins in voluntarily encountering, *Township of Crescent v. Anderson*, 114 Pa. St. 643 (1886); *Kunkle v. Lancaster County*, 219 Pa. St. 52 (1908); *Whitman v. Fisher*, 98 Maine 575 (1904); *Bush v. Union Pacific R. Co.*, 62 Kans. 709 (1901). In *Thompson v. Pennsylvania R. Co.*, 215 Pa. St. 113 (1906), a member of the crew of a fire engine, who knew that it was the custom of the driver of such engines not to stop and look and listen when approaching railway crossings, was held to have assumed the risk of being run over by a train negligently operated thereon.

⁴ Accord: *Hershey v. Mill Creek Township*, 9 Atl. 452 (Pa. 1887); *Brannen v. Kokomo Road Co.*, 115 Ind. 115 (1888); *Bresee v. Los Angeles Traction Co.*, 85 Pac. 152 (Cal. 1906). So where the plaintiff knows that the driver is actually at the time driving recklessly, *Vincennes v. Thuis*, 28 Ind. App. 523 (1902), or knows him to be a habitually reckless and careless driver, *Bresee v. Los Angeles Trac. Co.*, 85 Pac. 152 (Cal. 1906). See also, *Thompson v. Penna. R. Co.*, 215 Pa. St. 52 (1908), note 3.

no control over the team or its management is guilty of negligence merely because he does not exercise the same degree of vigilance in looking and listening on approaching a railway crossing which is required of the one having the control and management of the team. It is a matter of common knowledge that, under ordinary circumstances, passengers do largely rely on the driver, who has exclusive control and management of the team, exercising the required care when approaching a railway crossing, and we do not think that the courts are justified in adopting a hard and fast rule that they are guilty of negligence in doing so. Every case must depend largely upon its own particular facts."⁶

The question of the respondent's contributory negligence was thus for the jury to determine unless the evidence was such as to require the court to determine it as a question of law.

The appellant contends that the court erroneously instructed the jury as to the relation which existed between the respondent and the driver. The rule that the driver's negligence is not imputable to a person who is being carried in a vehicle is only applicable in cases where the relation of master and servant or principal and agent does not exist. The negligence of a person's own driver is imputable to him. *Markovits v. Metropolitan*, 186 Mo. 350; *Read v. City*, 115 Ga. 366. So where the parties are engaged in a joint enterprise or in a common employment the negligence of one is imputable to all. *Boyden v. Fitchburg*, 72 Vt. 89; *Donnelly v. Brooklyn*, 109 N. Y. 16.⁶ In *Cunningham v. City of Thief River Falls*, 84 Minn. 27, the court said: "Parties can not be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management."⁷

These parties were not engaged in a joint enterprise, neither

⁶ Compare the language of Peters, C. J., in *State of Maine v. Boston & Maine R. Co.*, 80 Maine 430 (1888), and Marshall, J., in *Pyle v. Clark*, 75 Fed. 644 (1896).

⁷ The decision of this case can only be supported on the ground that the plaintiff having an opportunity to discover the danger equal to that of the driver, was in personal fault in not availing himself thereof and in so far as the decision is based on the ground that two servants of the same master in the prosecution of his business are so engaged in a common enterprise that the negligence of one is to be imputed to the other, the case, though followed in *Schron v. Staten Island R. Co.*, 16 App. Div. 111 (N. Y. 1897), and *Cass v. Third Ave. R. Co.*, 20 App. Div. 591 (N. Y. 1897), is clearly against the overwhelming weight of authority, including *New York, McCormack v. Nassau Elec. R. Co.*, 18 App. Div. 333 (N. Y. 1897), *John Spry Lumber Co. v. Duggan*, 182 Ill. 218 (1899), *McKernan v. Detroit Citizens St. R. Co.*, 138 Mich. 519 (1904). See also, *Paulmier v. Erie R. Co.*, 34 N. J. L. 151 (1870), given in the appendix, and cases cited in the note thereto.

⁸ Accord: *Koplitz v. St. Paul*, 86 Minn. 373 (1902), with which compare *Shindelus v. St. Paul City R. Co.*, 80 Minn. 364 (1900); *McBride v. Des Moines City R. Co.*, 109 N. W. 618 (Supreme Court of Iowa, Nov. 13, 1906), holding that the crew of a hose carriage of a fire department were not engaged in a common enterprise with the driver; *Consolidated Trac.*

did the relation of principal and agent or master and servant exist between them. The respondent had contracted to be conveyed to Jasper for an agreed consideration. He was a passenger in a quasi public conveyance, and had no rightful control over the actions of the driver. Neither party had the right to direct the movements of the other. The respondent asked the liveryman at Bell Rapids what he would charge to take him to Jasper, and was informed that he would do it for \$2.50. Later in the day he telephoned for the team and the liveryman sent it with Nelson as driver. The driver was the servant of the liveryman. This is all the evidence as to the contract of hiring, and it fails to show any relationship which would charge the respondent with responsibility for the actions of the driver. In *Randolph v. O'Riordon*, 155 Mass. 331, it was held that the relationship of master and servant was not created by a mere contract for conveyance in a livery team.

The order from which the appeal is taken is therefore affirmed.

NEW YORK, LAKE ERIE & WESTERN R. R. CO. v. NEW JERSEY ELECTRIC CO.

Supreme Court of New Jersey, 1897. 60 N. J. L. 338.

LIPPINCOTT, J. In this case the action is brought by the New York, Lake Erie and Western Railroad Company by its receiver against the defendant to recover damages sustained by the locomotive engine and cars of the plaintiff, in a collision between the locomotive engine and an electric car of the defendant company, at a crossing over a public highway, at Singac, in Passaic county, on September 2d, 1895. The locomotive and some of the cars of the train belonged to the plaintiff company, and by it had been hired by the day, and from day to day, for use, to the New York and Greenwood Lake Railway Company, which latter company was, with its own engineer, fireman and employes, running the same over and upon its own roadbed and rails at such highway crossing at the time and place of collision.

The defendant was a street electric railway company, running along and upon the Little Falls road, which is a public highway, from Paterson to Passaic and Rutherford. The tracks of the New York and Greenwood Lake railway cross this highway at Singac. At the same point the electric car tracks of the defendant company cross the tracks of the plaintiff railroad company, and the collision between the electric car and the locomotive, whilst both were in the act of making this crossing, caused the damage to the locomotive and cars of the plaintiff.

The trial judge directed the jury to find a special verdict. The jury by their special verdict found negligence of the employes of

Co. v. Hoimark, 60 N. J. L. 456 (1897); *Reich v. Peck*, 83 Hun 214 (N. Y. 1894), with which compare *Beck v. East River Ferry Co.*, 6 Rob. 82 (N. Y. 1868); and see *State v. Boston & Maine R. Co.*, 80 Maine 430 (1888), with which compare *Boyden v. Fitchburg R. Co.*, 72 Vt. 89 (1899).

the defendant company causing the accident; also that the negligence of the employees of the New York and Greenwood Lake Railway company contributed thereto; and also that the plaintiff company had suffered damage to the amount of \$1,475.

On this verdict the *postea* was framed, and the motion now is for judgment thereon.

The right of the plaintiff to recover against the defendant is denied on the ground, first, that under the verdict finding that the contributory negligence of the New York and Greenwood Lake Railway Company having concurred and co-operated with the negligence of the defendant in causing the injury, that therefore the action should be alone against that company, and that for such injury action only can be had against the New York and Greenwood Lake Railway Company, which was the bailee of the plaintiff of the locomotive and cars, and that it can not be maintained against the defendant, although its negligence contributed to the injury.

This contention involves the question of the right of the bailor against a third party as wrongdoer in relation to the subject-matter of a bailment for hire for use.

It would seem to be clear that, under general principles, a bailor can maintain an action for injury to the property bailed, at the hands of a third party, who is a wrongdoer in relation thereto, especially wherever the injury is of a permanent character.¹ Therefore, the contention of the defendant that the right of action was alone against the bailee must fail.

But the defendant distinctly contends that the negligence of the bailee or its servants in the operation of this locomotive and train of cars by reason of this bailment, contributing to the injury, is imputable to the bailor and prevents a recovery on the part of the bailor against the defendant as a third party, who is a joint

¹ "There is no question but that for the injury to the actual possession of the bailee, action against a third party will lie only at the suit of the bailee, and the general current of authority appears to be that the bailee can include in such suit damages for the entire injury to the subject of the bailment, but no case is found which denies the right of the bailor to sue and recover for the permanent injury to the property even before the expiration of the bailment."

"The bailor, when he makes a bailment for hire, parts with the right of possession to the chattel, and it has been held that he can not, during the existence of the bailment, maintain an action of trespass for its asportation, or trover for its mere conversion, or replevin to recover back its possession, against any third person, but it seems to be the accepted doctrine, at present, that if any permanent injury be done to the chattel, he maintain a special action on the case against a third party for injury done by such third party to the reversionary interest, and this seems to be, both by reason and authority, the rule, whether an action might or might not be maintained by the bailee against such party for trover, trespass or replevin, to control the immediate possession. *Pol. Torts*, 432."

"A bailor need not look alone to his bailee for a wrong by a third party in connection with the bailee as respects the contract of bailment. If a bailee assumes to pledge or sell the bailed goods as his own, such an act amounts to a conversion and the bailor may immediately bring an action of trover or replevin against the third party in whose possession the property is found. *Story Bailm.* (9th ed.), § 413."

wrongdoer with the bailee. This joint negligence by the special verdict is found to have been the cause of the collision and injury, and, therefore, the case must be considered with the fact of the contributing negligence of the bailee established.

It may be deemed to be settled in this state that the employes or servants of a bailee are not the servants of the bailor in any such relation as to make the bailor liable to third parties for their negligence or misconduct in relation to the thing bailed. As where A hired a coach and horses with a driver from B, to take his family on a particular journey, and in the course of the journey, in crossing the track of a railroad, the coach was struck by a passing train and A was injured. In an action by A against the railroad company for damages it was held that the relation of master and servant did not exist between the plaintiff and the driver, and that the negligence of the driver, co-operating with that of the persons in charge of the train which caused the accident, was not imputable to the plaintiff as contributory negligence to bar his action. It was further held that for whatever purpose the negligence was invoked, whether as an action for injury done by the driver, or as contributory negligence to bar the action by the passenger, against the third person for an injury sustained, the negligence to be imputed to the passenger must be such as arises in some manner from his own conduct.

The negligence of the driver, without some co-operating negligence on his part, can not be imputed to the passenger in virtue of the simple act of hiring. *New York, Lake Erie and Western Railroad Co. v. Steinbrenner*, 18 Vroom 161; *Bennett v. New Jersey Railroad Co.*, 7 Id. 225.

There is no perceivable distinction between the case in hand and the cases last cited. Both rest upon a contract of bailment for the hire of a thing for use, and although a contract mutually beneficial to each of the parties, they are so independent of each other that the negligence of one can not be imputable to the other.

It is only when the contributory negligence is of such a character and the third person is so connected with the plaintiff that an action might be maintained against the plaintiff for damages for the consequences of such negligence, then when the plaintiff brings the action, that negligence is, in contemplation of law, the plaintiff's negligence, and it is justly imputed to him.

This relation does not exist between the bailor and bailee under the ordinary contract of bailment.

The cases cited by the defendant in his argument are mainly based on the doctrine laid down in *Thorogood v. Bryan*, 8 C. B. 114.

It is sufficient to say that this doctrine (of *Thorogood v. Bryan*) has been thoroughly disapproved in this state in the case of *New York, Lake Erie and Western Railroad Co. v. Steinbrenner*, 18 Vroom 161.

There is a line of cases in which the peculiar contractual relations between a shipper of goods and the common carrier thereof *locatio operis mercium vehendarum*, who is liable to the shipper

against all events except the acts of God or the public enemy, or the natural wear and tear of the article shipped, and responsible for all the consequences of his conduct as an insurer against loss except from such excepted causes, which hold the carrier alone responsible for injury. The shipper, according to such authorities, can not recover against a third party for negligence in the care of such goods or injuries to them.

The distinction between the relation which exists in law between the shipper and the common carrier of goods and the bailment for hire of a chattel for use is so obvious as not to need discussion. The carriage of goods is, by all legal writers, classed as a different contract of bailment having peculiarities, and governed by principles characteristic of the relation quite apart from the contract of bailment of chattels for hire.

The cases cited by the defendant are *Vander Plank v. Miller*, 1 Moo. & M. 169; *Simpson v. Hand*, 6 Whart. 311; *Transfer Company v. Kelly*, 36 Ohio St. 86; *Arctic Fire Insurance Co. v. Austin*, 69 N. Y. 470.² These cases are all cases which arise under the contract of bailment for the carriage of goods and chattels, not by a special, but by a common carrier. * * *

* * * He is treated as an insurer against all but the excepted perils (*Jones Bailm.* 101), and the shipper can not look beyond him for liability, and this rule is said to be grounded upon public policy.³

It would seem that the intervention of the negligence of the bailee could not shield the defendant from the injury caused by

² In *Vanderplank v. Miller*, the brief charge to the jury by Lord Tenderlen, C. J., at Nisi Prius gave no reasons for his statements that the owner of the goods could not recover if his carrier was in fault. The decision in *Simpson v. Haynd* was based on the idea that it would be improper to make "one wrongdoer responsible in case of another for an injury that both had committed and that it is more just that the carrier should answer to his employer rather than one in whom the employer had imposed no confidence." The court in *Transfer Co. v. Kelley*, sought to distinguish that case, one where a passenger was injured through the concurrent negligence of his carrier and the defendant, from those which held that the negligence of the carrier is to be imputed to the shipper of the goods on the ground of public policy, "which should not permit the liability of the carrier to be shifted to another either with or without the consent of the owner." With this compare *Lockhart v. Lichtenthaler*, 46 Pa. 151 (1863), in which the court held that while a passenger in a private conveyance was not barred by the negligence of the driver, the passenger of a common carrier was barred by his carrier's negligence, a decision long since repudiated in Pennsylvania, see *Cahill v. Railway*, ante. The case of *Arctic Fire Insurance Co. v. Austen*, was expressly based upon the fact that the carrier was "a bailee and quasi the agent of the shipper." The New York cases allowing a passenger to recover notwithstanding the negligence of the carrier were distinguished on the ground that "there is no bailment and no agency in those cases, there is no absolute obligation of the carrier to deliver his passengers safely; the carrier can not maintain an action for an injury to his passengers." In that case the plaintiff was the insurer of a cargo of corn shipped in the canal boat "Parsons."

³ In the case of the *Milan*, 5 Probate Division, Lushington 388 (1861), Dr. Lushington declining to be bound by *Thorogood v. Bryan*, held that the owner of a cargo was not barred by the contributory negligence of the master and crew of the vessel in which his goods were laden. His opinion

its own negligence. Both might have been selected as joint tortfeasors, or the action could be maintained against either.

The conclusion reached is that the plaintiff had the right to sue either or both these companies for the injuries arising from their negligence to the locomotive and cars of the plaintiff, and it is not a defense to the action that the accident was contributed to by the negligence of the other. Each is liable upon its own negligence, and the negligence of the bailee is not imputable to the plaintiff as a shield to the defendant against recovery.⁴

Judgment must be entered on *postea* for the damages found by the jury.

WARREN *v.* MANCHESTER STREET RAILWAY CO.

Supreme Court of New Hampshire, 1900. 70 N. H. 352.

PIKE, J. The question whether a parent's negligence can be imputed to his child, so as to bar a recovery by the child against a third person, has been considered by the courts of many states, and conflicting conclusions have been reached. The question first arose in *Hartfield v. Roper*, 21 Wend. 615, where it was decided in the affirmative. The court said: "An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect."¹ This rule was

in this case was cited and approved by Lord Esher in the case of the *Bernina* (see note to *Thorogood v. Bryan*, *ante*) and by Lord Herschell in the same case upon appeal in the House of Lords, while in an opinion prepared by Lord Bramwell but not read, he regards it as obvious that, if a passenger may maintain an action against a third person notwithstanding the negligence of his carrier an owner of goods may likewise maintain an action, and he points out what he regards as "a ludicrous case of a collision between railways A. and B., injury to goods in each and actions maintainable by owners of goods carried by A. against B. and of goods carried by B. against A., when possibly neither had any remedy against his own carrier." In *Henderson v. Chicago R. R. Co.*, 170 Ill. App. 616 (1912), it was held that where the plaintiff's goods were injured in a collision between one of the defendants' cars and a wagon in which a teamster (who carried on a regular business as such) employed by him was conveying them, the plaintiff could recover though the teamster and the defendant conductor were both guilty of negligence concurring to produce the collision.

⁴ *Accord*: *Alabama Great Southern R. R. Co. v. Clarke*, 145 Ala. 459 (1906); *Currie v. Cons. R. Co.*, 81 Conn. 384 (1908); *Gibson v. Bessemer & Lake Erie R. Co.*, 37 Pa. Sup. Ct. 70 (1908), 226 Pa. St. 198 (1910); but see *Forks Township v. King*, 84 Pa. 230 (1877); *Sea Ins. Co. of Liverpool v. Vicksburg, S. & P. R. Co.*, 159 Fed. 676 (1908); *contra*, *Smith v. Smith*, 2 Pick. 621 (Mass. 1825); *Ill. Cent. R. Co. v. Sims*, 77 Miss. 325 (1899); *Wetly v. Indianapolis & Vincennes R. Co.*, 105 Ind. 55 (1885), and see *Puterbaugh v. Reasor*, 9 Ohio St. 484 (1859).

¹ In this case the court, before discussing the effect of the parent's negligence in allowing the plaintiff, a child of two, to play upon a country road, where he was run over by the defendant's sleigh, upon the plaintiff's right to recover for the injuries so received, had intimated its opinion that the defend-

questioned in Vermont soon after its announcement, and has been rejected quite generally elsewhere. In *Robinson v. Cone*, 22 Vt. 213, 224, *Redfield, J.*, said: "We are satisfied, that although a child, or idiot, or lunatic may to some extent have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress." In *Smith v. O'Connor*, 48 Pa. St. 218, 221, the court said: "We are asked to approve and

ant had exercised all the care which the law required and that the case was one of mere unavoidable accident. In discussing the effect of the parent's negligence, the court said in addition to the language quoted above, "The child has a right to the road for the purposes of travel, attended by the proper escort. But at the tender age of two or three years, and even more, the infant can not personally exercise that degree of discretion, which becomes instinctive at an advanced age, and for which the law must make him responsible, through others, if the doctrine of mutual care between the parties using the road is to be enforced at all in his case." "Suppose a hopeless lunatic suffered to stray by his committee, lying in the road like a log, shall the traveller, whose sleigh unfortunately strikes him, be made amenable in damages? The neglect of the committee to whom his custody is confided shall be imputed to him. It is a mistake to suppose that because the party injured is incapable of personal discretion, he is, therefore, above all law. An infant or lunatic is liable personally for wrongs which he commits against the person and property of others. *Bullock v. Babcock*, 3 Wendell, 391, 394. And when he complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury. He can not, more than any other, make a profit of his own wrong. *Volenti non fit injuria*. If his proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian, than that the latter should negligently allow his ward to be in the way of travellers, and then harass them in courts of justice, recovering heavy verdicts for his own misconduct."

As to the intimation, in the opinion in *Hartfield v. Roper*, that it would work injustice to the defendant, if there was not some one whose contributory negligence would be capable of excusing his, the defendant's fault, so as to relieve him from liability, see the opinion of Strong, J., in *Smith v. O'Connor*, 48 Pa. 218 (1864), "Nor has a wrongdoer defendant any reason to complain that an infant child is not held responsible for his lack of care. He is called upon to answer for his own misconduct but nothing more, alike when the plaintiff is an infant as if the plaintiff is an adult. It may be his good fortune that in the one case the person injured was also blameworthy, but this can not detract from the wrong of his own conduct. When the wrongful conduct of a defendant has been established it is not unjust to him that he should be required to repair the mischief he has done."

Hartfield v. Roper has been followed in Massachusetts in *Wright v. Malden & Melrose R. Co.*, 4 Allen (86 Mass.) 283 (1862); *Cotter v. Lynn & B. R. Co.*, 180 Mass. 145 (1901); in California in *Meeke v. Cal. So. Pac. R. Co.*, 52 Cal. 602 (1878); in Maine in *Leslie v. Lewiston*, 62 Maine 468 (1873); in Wisconsin in *Parish v. Eden*, 62 Wis. 272 (1885); in Maryland in *Baltimore City Passenger R. Co. v. MacDonell*, 43 Md. 534 (1875), it is assumed that the negligent custody will bar the child even though the actual point was not necessary for decision, since the child was guilty of no conduct negligent in an adult. See also *Kyne v. Wilmington & N. R. Co.*, 14 Atl. 922 (Del. 1888). The earlier cases in Indiana, Kansas and Minnesota followed *Hartfield v. Roper*, *Atchison, Topeka & S. F. R. Co. v. Smith*, 28 Kans. 541 (1882); *Pittsburgh, Ft. Wayne & Chicago R. Co. v. Vining*, 27 Ind. 513 (1867); *Fitzgerald v. St. P., M. & M. R. Co.*, 29 Minn. 336 (1882).

Even in these jurisdictions however, the rule only applies to children so young as to be incapable of caring for themselves and only where the parent having been negligent in the custody of the child, the child being thus exposed

apply the doctrine held by the New York courts, and first enunciated in *Hartfield v. Roper*, 21 Wend. 615. There it is ruled that the negligence or imprudence of the parents or guardians in allowing a child of tender age to be exposed to injury in a highway furnishes the same answer to an action by the child as the negligence or other fault of an adult plaintiff would in a similar case. The negligence of the parents or guardians is imputed to the child, and hence, unless the infant plaintiff has exercised that care and prudence which are demanded of an adult, unless equally guiltless of any negligence concurring with a wrongful act of a defendant in causing an injury, no action can be sustained. This is compelling the child to the exercise, not of its own, but of its parents' discretion. It is holding it responsible for the ordinary care of adults. In our opinion, the rule thus broadly stated does not rest upon sound reason." In *Bellefontaine etc. R. R. v. Snyder*, 18 Ohio St. 399, 409, it was said: "It is the old doctrine of the father eating grapes, and the child's teeth being set on edge. The strong objection to it is its palpable injustice to the infant. Can it be true, and is such the law, that if only one party offends against an infant he has his action, but that if two offend against him their faults neutralize each other, and he is without remedy?" In *Newman v. Railroad*, 52 N. J. Law 446, 449, 450, *Beasley*, C. J., said: "This doctrine of the imputability of the misfeasance of the keeper of a child to the child itself is deemed to be a pure interpolation into the law, for until the case under criticism it was absolutely unknown; nor is it sustained by legal analogies. Infants have always been the particular

to danger has been guilty of conduct which if done by an adult would be negligent in him, or which a child under proper custody would not be allowed to do, *McGarry v. Loomis*, 63 N. Y. 104 (1875); *Ihl v. Forty-second St. & Grand St. Ferry*, 47 N. Y. 317 (1872); *Lynch v. Smith*, 104 Mass. 52 (1870); *Casey v. Smith*, 152 Mass. 294 (1890); *O'Brien v. McGlinchy*, 68 Maine 552 (1878); *McNeil v. Boston Ice Co.*, 173 Mass. 570 (1899).

It is also clear that no matter how careless the parent may have been in caring for his child, his negligence is no bar to recovery if the defendant had the "last clear chance" to avoid injuring the child in its exposed and dangerous situation, *Bisaillon v. Blood*, 64 N. H. 569 (1888); *Baltimore, etc., R. Co. v. MacDonell*, 43 Md. 534 (1875); or where the defendant's conduct is not negligent merely but wanton or reckless, *Schierhold v. North Beach & Mission R. Co.*, 40 Cal. 447 (1871).

It was held in *Hennessey v. Brooklyn City R. Co.*, 6 App. Div. 206 (N. Y. 1896), that, where the infant plaintiff who was in its mother's arms in a vehicle driven by its father was run down by the concurrent negligence of the father and the defendant, the negligence of the father in driving the vehicle can not be imputed to the child, *accord, Lewin v. Lehigh Valley R. Co.*, 52 App. Div. 69 (N. Y. 1900); *contra, Delaware, L. & W. R. Co. v. Devore*, 114 Fed. 155 (1902). In *Leslie v. Lewiston*, 62 Maine 468 (1873), the plaintiff, a young girl, who fell into a ditch by the house of her father, where she resided, was held precluded from recovery by the father's negligence in permitting the ditch to remain uncovered.

In *Waite v. Northeastern Ry. Co.*, 1 Ellis, B. & E. 719 (1858), the infant plaintiff, who was injured by the negligence of the defendant railway while traveling upon a ticket bought by his grandmother and in her custody, was held barred by her contributory negligence, largely upon the ground that the defendants' liability was limited by the terms of the contract of carriage, which was upon "the implied condition" that the child was to be accompanied by the person having it in charge, per Cockburn, C. J., p. 733.

objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: 'The common principle is that an infant in all things which sound in his benefit shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything in his disadvantage.' 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondeat superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control nor remove him, and the injustice, therefore, of making the latter responsible in any measure whatever for the torts of the former would seem to be quite evident. Such subjectivity would be hostile in every respect to the natural rights of the infant, and consequently can not, with any show of reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian, 'you and I, by our common carelessness, have done this wrong, and therefore neither can look to the other for redress'; but when such wrongdoer says to the infant, 'your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to your guardian alone,' a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: an infant of tender years can not be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being that he can in no case be considered to be the blamable cause, either in whole or in part, of his own injury."

It has never been held in this state that the negligence of one person is imputable to another, unless the former was the servant or agent of the latter. *Noyes v. Boscawen*, 64 N. H. 361. Apparently the doctrine of *Hartfield v. Roper* was based upon the assumption that the custodian of the infant was his agent. Such an assumption is clearly erroneous, for no such agency can exist in fact. All the elements of agency are wanting. The infant neither ap-

points his custodian nor has power or capacity to remove him. Such a "custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian can not surrender or impair a single right of any kind that is vested in the child, nor impose any legal burthen upon it. If a mother traveling with her child in her arms, should agree with a railway company that, in case of an accident to such infant by reason of the joint negligence of herself and the company, the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds,—first, the contract would be *contra bonos mores*, and, second, because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless, the position has been deemed defensible that the same evil consequences to the infant will follow from the negligence of the mother, in the absence of such supposed contract, as would have resulted if such contract should have been made and should have been held valid." *Newman v. Railroad*, 52 N. J. Law 446, 448.

The reasons which prevent an adult from a recovery for injuries which his negligence contributed to produce are (1) "The mutuality of the wrong, entitling each party alike, where both are injured, to his action against the other, if it entitles either; (2) the impolicy of allowing a party to recover for *his own* wrong; and (3) the policy of making the personal interests of parties dependent upon their own prudence and care. All these are wanting in the case of the infant plaintiff." *Bellefontaine etc. R. R. v. Snyder*, 18 Ohio St. 399, 409. If negligence of a parent can be imputed to prevent a child's recovery for its injury, it follows that it can also be imputed to render the child liable in damages; but such is not the law. "It is difficult to perceive what principle of public policy is to be subserved, or how it can be reconciled with justice to the infant, to make his personal rights dependent upon the good or bad conduct of others." *Bellefontaine etc. R. R. v. Snyder, supra*, 409.

The doctrine of *Hartfield v. Roper* imposes burdens and hardships upon the helpless infant that are manifestly unjust. It is opposed by the great weight of modern authorities, and by sound judicial reason. *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 374; *Railway Co. v. Rexroad*, 59 Ark. 180, 185; *Daley v. Railroad*, 26 Conn. 591, 598; *Moore v. Railroad*, 2 Mackey 437, 449; *Chicago etc. Co. v. Wilcox*, 138 Ill. 370, 373; *Evansville v. Senhenn*, 151 Ind. 42; *Wymore v. County*, 78 Iowa 396, 397; *Missouri etc. Ry. v. Shockman*, 59 Kans. 774; *South Covington etc. Ry. v. Herrklots*, 47 S. W. Rep. 265 (Ky. 1898); *Westerfield v. Lewis*, 43 La. 63; *Shippy v. Au Sable*, 85 Mich. 280, 292; *Westbrook v. Railroad*, 66 Miss. 560, 568; *Winters v. Railway*, 99 Mo. 509, 519; *Huff v. Ames*, 16 Neb. 139, 142; *Bottoms v. Railroad*, 114 N. C. 699, 706; *Erie etc. Ry. v. Schuster*, 113 Pa. St. 412, 416; *Whirley v. Whitman*, 1 Head 610, 619; *Norfolk etc. R. R. v. Ormsby*, 27 Grat. 455,

476; *Roth v. Company*, 13 Wash. 525, 545; *Dicken v. Company*, 41 W. Va. 511.² It is not in harmony with the principles of the law of this state, and is not adopted as a part of its jurisprudence.

HONEY v. CHICAGO, B. & Q. RY. CO.

Circuit Court, Southern Dist. of Iowa, 1893. 59 Fed. 423.
United States Circuit Court of Appeals for Eighth Circuit, 1894. 63 Fed. 39.

Mrs. Honey was struck by a switch engine of the defendant and injured. She brought an action to recover for the injuries to her person and her husband W. O. B. Honey brought an action to recover damages for the loss of her society and services. The court ordered that the two cases should be tried together before the same jury.

"The court instructed the jury that if Mrs. Honey, by negligence on her part, had contributed to the accident, she could not recover, but that negligence on her part would not defeat the action on behalf of her husband."

The jury found a verdict for the defendant in the suit brought by Mrs. Honey and for the plaintiff in the suit brought by her husband. The defendant moved for a new trial.

SHIRAS, District Judge. The Supreme Court of Iowa, in construing the statute of the state, has declared the law to be that there can not be a joinder of the husband and wife in actions of this character. The wife must sue alone upon the cause of action accruing to her, and so also must the husband. A judgment rendered in the one case can not be availed of even as evidence, and much less as an adjudication in the other.¹

It can not be successfully maintained that the right of action in behalf of the husband is derived from the wife. The right of action on behalf of the husband to recover the damages resulting to him

² *Accord*: also *Ferguson v. Columbus & Rome R. Co.*, 77 Ga. 102 (1886); *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64 (1883); *Robinson v. Kohn*, 22 Vt. 213 (1850); *Chicago G. W. R. Co. v. Kowalski*, 92 Fed. 310 (34 C. C. A. 1 (with elaborate notes) 1899); *Jacksonville Electric Co. v. Adams*, 50 Fla. 429 (1905), see *Evansville v. Lenherm and Mo. R. R. v. Stockman*, cited in the principal case, and *Matson v. Minn. etc. R. R.*, 90 Minn. 471 (1903).

For valuable notes on the whole subject, see 21 L. R. A. 76 and 8 L. R. A. (N. S.) 664-669.

Where the parent himself sues for the loss of his child's services, he can not recover if his negligent custody is the contributing cause of the injury, *Pittsburgh, Allegheny & Manchester R. Co. v. Pearson*, 72 Pa. 169 (1872).

¹ "The plaintiff in the one case can not release or discharge the right of action belonging to the plaintiff in the other. The payment of damages in the one case has no legal effect upon the damages to be awarded in the other. The admission or statements of the wife, not forming part of the 'res gestæ,' are not admissible as evidence against the plaintiff in the suit by the husband, although they are evidence against the plaintiff in the suit brought by the wife; and so also the admissions of the husband, though provable against him, are not admissible in the suit of the wife. In all particulars the right of action accruing to the wife and that accruing to the husband are separate and distinct."

never belonged to the wife. She could not assign or release the same. The husband's right of action is based upon the invasion of his rights, and recovery is sought of the consequential damages caused him. The legal injury complained of is that caused to the husband, and not that caused to the wife. The negligence of the wife can not, therefore, be availed of as a defense to the husband's action on the ground that he stands in the position of an assignee or representative of a right of action accruing to the wife, or upon the theory that his right of action is derived through her.

Can it be said, in any proper sense, that the wife, with relation to the accident, occupied the position of agent for her husband? In going to the depot, in order that she might take passage upon the train, she was not acting for her husband in any proper sense. She was not undertaking to do anything in furtherance of any business belonging to the husband, nor was she exercising any rights, powers, or authority derived from him. She was acting in her own right, for a purpose personal to herself. As is pointed out in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, to constitute the relation of principal and agent in such sense that the negligence of the latter can be imputed to the former, the relation must be such that responsibility to third parties would attach to the principal for injuries resulting from the negligence of the agent; or, to apply the rule to this case, the relation must be such that W. O. B. Honey would be liable to third parties for injuries caused them by the negligence of Ellen Honey.

Can it be defeated on the ground that she was his wife? In considering this aspect of the case it must be always remembered that the legal fiction of the common law, that a husband and wife are one, and that one is the husband, has been wholly abrogated in Iowa by the legislation of the state.

Touching liability for the acts of a wife, it is declared by section 2205 of the Code of Iowa that:—

“for all civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in cases where he would be jointly responsible with her, if the marriage did not exist.”

This section abrogates the common-law liability of the husband for the acts of the wife, and there is no longer any legal liability on part of the husband to third parties for the consequences of her negligent acts, simply on the ground that she is his wife. To hold the husband responsible for the consequences of her negligence, it must appear that he would be responsible if he was not her husband.

The motion for new trial is therefore overruled.

Defendant brings error to the Circuit Court of Appeals. Before Caldwell and Sanborn, Circuit Judges, and Thayer, District Judge.

THAYER, District Judge. The learned judge of the trial court appears to have been of the opinion that a husband suing for the loss of the services of his wife, and for medical expenses, occasioned by the negligence of a third party, is, in the state of Iowa at

least, unaffected by the fact that the wife was guilty of contributory negligence, because the laws of that state have abolished the legal fiction of the identity of husband and wife, and have exempted the husband from responsibility for the negligence and misfeasance of the wife. Whenever the question has heretofore been considered, it seems to have been taken for granted that the relation existing between husband and wife or parent and child is of such character that the plea of contributory negligence on the part of the wife or child, if the latter is of sufficient age and intelligence to be chargeable with negligence, is a good defense, when the husband or parent brings a common-law action to recover for the loss of service or for medical expenses consequent upon physical injuries sustained by the wife or child through the concurring fault of another. The following are some of the cases, and doubtless there are others, where this principle has been recognized and enforced: *Railroad Co. v. Terry*, 8 Ohio St. 570; *Dietrich v. Railway Co.*, 58 Md. 347; *Benton v. Railway Co.*, 55 Iowa 496, 8 N. W. 330; *Iron Co. v. Brawley*, (Ala.) 3 South. 555; *Gilligan v. Railroad Co.*, 1 E. D. Smith, 453.² In none of these cases last cited was the reason of the rule stated, nor was the subject much discussed.³ It seems to have been taken for granted that the concurring negligence of the injured party was a sufficient defense to a suit by the husband or parent, when suing merely for a loss of the services of the injured party, or for medical expenses incurred and paid by him in the discharge of his obligation as husband or parent. If we look for the true foundation of the rule in question, we apprehend that it will not be difficult to find. When one person occupies such a relation to another rational human being that he is legally entitled to her society and services, and to maintain a suit for the deprivation thereof, he should not be permitted to recover in such an action if the loss was occasioned by the concurring negligence of the person on whose account the right of action is given. If the person from whom the right of service and society is derived is capable of taking ordinary precautions to insure her own safety, and the person to whom the right of service belongs suffers her to go abroad unattended, and to exercise her own faculties of self-preservation, it is no more than reasonable to hold him responsible, in a suit for loss of society and service, for the manner in which such faculties have been exercised. We can conceive of no greater reason for deciding, in a case of this character, that a husband is not accountable for the conduct of his wife in caring for the safety of her own person, than there would be for holding that he was not chargeable with her contributory negligence in the management of a horse and carriage belonging to the husband, which she has been permitted to use for her own pleasure and convenience. In either case the fact that the husband has per-

² Citing "*Yahn v. City of Ottumwa*, 60 Iowa 429, 15 N. W. 257, as explained in *Nisbet v. Town of Garner*, 75 Iowa 314, 317, 39 N. W. 516; *Peck v. N. Y., N. H. & H. R. Co.*, 50 Conn. 379; *Carlisle v. Sheldon*, 38 Vt. 440, 447."

³ See also, *Oakland etc. R. Co. v. Fielding*, 48 Pa. 320 (1864).

mitted the wife to control her own movements and to provide for her own safety, upon the evident assumption that she is competent to do so, should preclude him from asserting, in a suit against a third party for loss of service or society or for a loss of property, that he is not responsible for her contributory fault whereby the loss was occasioned. By the Iowa courts, it is said that the husband's negligence is imputable to the wife under such circumstances, because of the marital relation which entitles her to his care and protection.⁴

Even if we should concede it to be the better view that the husband's contributory negligence is not imputable to the wife when she sues in her own right for an injury sustained, still we think that it would not be a reasonable deduction from this rule that the husband is likewise unaffected by the wife's negligence when he sues for loss of services and medical expenses; for, when the wife brings an action for personal injuries which she has sustained, the right of action is in no wise dependent upon the marital relation. She does not derive her right to sue from that relation, but brings suit like any other person for an injury sustained through the fault of another. At common law it was necessary for the wife to be joined as plaintiff in such a suit, because she was regarded as the meritorious cause of action. But on the other hand, the husband's right to sue for loss of society and services grows out of the marital relation, and is incident to the rights thereby acquired. It has its origin in the existence of a valid marriage, which relation entitles him to the benefit of the wife's services and society, and which also imposes on him the duty of providing her with medical attendance in case of sickness or accident. The right of action is incident to the marriage relation, and can not exist without it. We think, therefore, that, even if it is the better view that the husband's contributory negligence can not be imputed to the wife when she sues for her own injuries, yet that when the husband brings an action for the loss of society and services, which loss was due to the contributory fault of the wife, her want of ordinary care should nevertheless be imputed to the husband on the grounds heretofore indicated. As the respective rights of action are predicated on different grounds,—the one growing out of the marriage relation, and the other existing entirely independent of that relation,—there is no logical difficulty in holding the husband accountable for the contributory negligence of the wife, although the latter is not responsible for the contributory fault of her husband.

If it is true, as has been intimated, that the statutes in question free the parties to the marriage contract from all obligations to each other, save those of affection and loyalty, then it would be pertinent to inquire upon what theory the husband can be permitted to prosecute a suit like the one now in hand. It certainly can not be maintained that the husband is entitled to sue for damages consequent upon the loss of his wife's services and society, unless she is still

⁴ See however *Bigelow on Torts*, 6th ed. 385, 7th ed. 406, and *Bishop on Non-Contract Law*, § 584.

under an obligation to the husband, as at common law, to care for his home, attend to the wants of his family, and do whatever else is within her power which is conducive to his comfort, happiness, and prosperity.

We can discover nothing in the language of the statute which gives it any greater scope, or which fairly indicates that the legislature intended to deprive a third party of the benefit of the plea of contributory negligence when he is sued by the husband for an injury sustained by the wife in consequence of her own and such third party's negligence. Entertaining these views, the judgment of the circuit court is reversed and the case is remanded, with directions to award a new trial.⁵

CHAPTER III.

Plaintiff's Breach of Statutory Duty.

MONROE v. HARTFORD STREET RAILWAY CO.

Supreme Court of Errors of Connecticut, 1903. 76 Conn. 201.

Action to recover damages for negligently running into and injuring the plaintiff's milk wagon, brought to the Court of Common Pleas in Hartford County and tried to the jury before Coats, J.; verdict and judgment for the plaintiff, and appeal by the defendant. *Error and new trial granted.*

The plaintiff was the owner of a pair of horses and wagon, used for the daily delivery of milk upon a route including Asylum Avenue in the city of Hartford, which was driven by his servant, Brewer.

The defendant operated an electric railroad upon Asylum Avenue.

At the time of the injury complained of, the plaintiff's team was standing across Asylum Avenue with the wagon upon the tracks of defendant's railroad, the plaintiff's servant, Brewer, being at the time in the kitchen of a neighboring house occupied by one Patten. While thus standing the wagon was struck by a car of defendant, thrown off the track, and the wagon and its contents injured.

The complaint charges the defendant with negligence, in that it "negligently struck said wagon as it was standing stationary on said tracks," while "running a car at a high rate of speed."

HAMMERSLEY, J. The purpose of the city ordinance is obvious. It assumes that any horse in a city street without a driver or keeper is a source of danger to the person and property of those using the

⁵ *Accord: Winner v. Oakland*, 158 Pa. St. 405 (1893).

street, unless the horse is hitched, and that injury to such persons may be the natural result of leaving an unhitched horse in a city street. For the protection of such persons and the prevention of such injuries, it makes the act of leaving any unhitched horse in a city street a misdemeanor punishable by a fine. *State v. Keenan*, 57 Conn. 286.

It is also obvious that the evil provided against includes not only the permanent or indefinite abandonment of a horse, but those temporary departures which are most likely to frequently occur if not forbidden. The meaning of the language used to accomplish this obvious purpose is clear. There can be no reasonable doubt as to the meaning of "unhitched," used in this connection, and very little as to "leaving." Certainly going away from the horse beyond sight, hearing, and reasonably immediate reach, is "leaving" it within the meaning of the ordinance. When an unhitched horse has been thus left, the ordinance has been violated, whether the horse is gentle and well trained or not.

(The court instructed the jury that the plaintiff might retain control over his horse though left unhitched in the street and that it was for them to determine whether the horse was still within his control, and that the kind of control which the driver may retain over a horse which he has left in the street was a question of fact for them to settle.)

This instruction, in view of the state of the evidence and claims made, was inaccurate and inadequate. It was, however, harmless, if a violation of the ordinance could not be a proximate cause of the injury alleged, and a new trial should not be granted unless it is clear as a matter of law that when a driver has left his horse in the street unhitched, and a collision between his team and another vehicle occurs directly after he has left them and near the place where he has left them, this unlawful act of his may be a proximate cause of the injury inflicted by the collision. We think it is clear that such an unlawful act may be a proximate cause of such injury.

There is some real and more apparent conflict of opinion in the many cases treating of the relation between an illegal act and a co-incident injury. In doing an unlawful act a person does not necessarily put himself outside the protection of the law. He is not barred of redress for an injury suffered by himself, nor liable for an injury suffered by another, merely because he is a lawbreaker.¹

¹ Where the defendants' sole wrong lies in the illegality of his act and the plaintiff participates therein, even though his participation goes no further than witnessing its commission as a spectator, he can not recover if injured. The plaintiff if merely a spectator, however, is not barred from recovery if the illegal act is so improperly done as to threaten and cause injury to him as a spectator, *Scanlon v. Wedger*, 156 Mass. 462 (1892), a spectator on the highway injured by the setting off of fireworks by the defendant under a void license issued by the town authorities; *Frost v. Joslin*, 180 Mass. 389 (1901); *Johnson v. City of New York*, 186 N. Y. 139 (1906), plaintiff, while trespassing upon private property upon the highway for the purpose of watching an automobile race illegally authorized by the city of New York therein, injured by a skidding automobile. It would seem from these cases that if the plaintiff had been a person using the highway as a traveller, he

In actions to recover for injuries not intentionally inflicted but resulting from a breach of duty which another owes to the party injured—commonly classed as actions for negligence—the fact that the plaintiff or defendant at the time of the injury was a lawbreaker may possibly be relevant as an incidental circumstance, but is otherwise immaterial unless the act of violating the law is in itself a breach of duty to the party injured in respect to the injury suffered. Ordinarily, in actions of this kind, the breach of duty is a failure to exercise, in conduct liable to be dangerous to others, that care which a man of ordinary prudence would exercise under the particular circumstances of the case. But the State regards certain acts as so liable to injure others as to justify their absolute prohibition. In such case doing the forbidden act is a breach of duty in respect to those who may be injured thereby.

The cause of action which arises upon an injury resulting from a breach of duty in respect to the party injured in neglecting to use that care which the law requires under the particular circumstances of the case, for the protection of those liable to be injured by such neglect, is the same as the cause of action arising upon an injury resulting from a breach of duty in respect to the person injured in doing an act forbidden by statute, for the protection of those liable to be injured through such act. The main distinction lies in the method of proof. In the former case, the breach of duty must be established by showing a want of due care under all circumstances; in the latter case it may be established by proving the commission of the illegal act. In both cases two questions are presented. First, was there a breach of duty in respect to any person liable to be injured by the conduct proved? Second, was this breach of duty a proximate cause of the injury alleged? And the principles which determine the relation of the negligent conduct in the one case, or the illegal act in the other, to the resulting injury as a proximate cause, are the same.

Applying the principles which determine the causal relation between a negligent act and the following injury, to the admitted facts in the present case, it is apparent that the illegal act was not necessarily a mere independent concomitant or condition of the collision, but might well be a contributing cause, and might be, according as the jury should find the attendant or surrounding circumstances, a proximate cause of the injury. "Cause" and "consequence" are correlative terms. One implies the other. When an event is followed in natural sequence by a result it is adapted to produce, or aid in producing, that result is a consequence of the event, and the event is the cause of the result.

The illegal act of leaving horses, harnessed to a wagon, unhitched, is adapted to aid in producing a collision resulting from the horses, thus left unrestrained, pursuing their own way through the street. It is for this very reason that the State makes the act illegal. When the resulting collision follows such illegal act in natural se-

could have recovered in any of these cases, on the ground merely of the illegality.

quence, the act is a cause of the collision, and if the sequence is direct and unbroken by any independent, intervening cause, may be the proximate cause. Whether or not, under all the circumstances of the case, it is the proximate cause, is a question of fact for the jury under proper instructions from the court.

The fact that the plaintiff's servant had violated the city ordinance was, therefore, one upon which the plaintiff's right of recovery might depend, and the error of the trial court in the instructions given upon the meaning of that ordinance was material and harmful.²

BOURNE v. WHITMAN.

Supreme Court of Massachusetts, 1911. 209 Mass. 155.

KNOWLTON, C. J. These are actions to recover for injuries received from a collision between two automobiles, in one of which were the two plaintiffs. The accident happened late in the evening of August 15, 1908. The defendants asked the judge to instruct the jury as follows: "If the jury find that at the time of the accident the defendant was driving on the right of the middle of the travelled part of the way, it is evidence of the exercise of due care on his part, and if the jury shall find that the plaintiff Bourne was driving his machine in an opposite direction and collided with the defendant, this is evidence that the plaintiff was acting in violation of R. L. c. 54, § 1, requiring him to drive to the right of the middle of the travelled part of the road, and unexplained indicates negligence on the part of the plaintiff." There was evidence to which the request was applicable. There was also other evidence bearing upon the questions whether the plaintiffs were in the exercise of due care and whether the defendants were negligent. The request was in accordance with the law as laid down in *Perlstein v. American Express Co.*, 177 Mass. 530, and in other cases, and it well might have been given. Perhaps the defendants properly might have gone further and have asked for an instruction that if the jury found the facts stated in the request, and also found that this violation of the statute was one of the direct and proximate causes of the collision, the plaintiff Bourne could not recover. *Newcomb v. Boston Protective Department*, 146 Mass. 596.

One of the defendants was a father, who owned the automobile,

² *Accord: Newcomb v. Boston Protective Dep.*, 146 Mass. 596 (1888), facts similar to those in principal case; and see other Massachusetts cases cited in *Newcomb v. Boston, etc.*, and in *Bourne v. Whitman, post: Baker v. Portland*, 58 Maine 199 (1870), plaintiff injured by defect in highway while driving faster than ordinance permitted, *Chesapeake, etc., v. Jennings*, 98 Va. 70 (1900), similar facts, with which compare *Weller v. Chi., M. & St. P. R. Co.*, 120 Mo. 635 (1893); *Tackett v. Taylor*, 123 Iowa 149 (1904), defective bridge fell while the plaintiff was upon it operating a traction engine in a way which, while prohibited by statute, had nothing to do with its fall; *Welch v. Weeson*, 6 Gray 505 (Mass. 1856), and *Broschart v. Tuttle*, 59 Conn. 1 (1895), plaintiff injured by negligence of defendant with whom he was racing in violation of a statute.

and the other was his minor son nineteen years of age, who operated it as his chauffeur a part of each year, without compensation. He had had a license to operate an automobile as chauffeur for his father, William P. Whitman, in 1905, 1906, 1907 and 1908, up to August 14, 1908, when the license expired. He had made an application for another license which was issued to him on August 17. On August 15, 1908, the day of the accident, he was operating the machine without a license. The evidence tended to show that he was of large experience in this business and presumably thoroughly competent.

At the request of the plaintiffs, the judge instructed the jury that "Richard P. Whitman at the time of the accident was a trespasser upon the highway and had no legal right then and there to operate the car." Under the first part of the instruction the plaintiffs owed him no duty except to refrain from inflicting an injury upon him wantonly or recklessly. He had no right to put his car in the way of the plaintiffs, or to interfere with their use of the road in any part which they chose to occupy. The rights and duties of both parties were different from those of ordinary travellers. Presumably the instruction affected the decision, and if it was erroneous, there must be a new trial.

For the discussion of this part of the case, we assume that the defendant Richard received no protection from Dr. Hunt's license.¹ He was then violating the law in not having obtained another license before running the car. What effect did this violation have upon the right of either party to recover, when there was an accidental collision between his car and that of another driver on the highway?

It is universally recognized that the violation of a criminal statute is evidence of negligence on the part of the violator, as to all consequences that the statute was intended to prevent. It has been said in a general way that such a violation is evidence of negligence of the violator, and it has sometimes been stated that this would show negligence, that can be availed of as a ground of recovery by one who suffers any kind of an injury from him while this illegality continues; but it is now settled that it is not even evidence of negligence, except in reference to matters to which the statute relates. *Davis v. John L. Whiting & Son Co.*, 201 Mass. 91, 96 and cases cited. A criminal statute in the usual form is enacted for the benefit of the public. It creates a duty to the public. Every member of the public is covered by the protecting influence of the obligation. If one suffers injury as an individual, in his person or his property, by a neglect of this duty, he has a remedy, not because our general criminal laws are divided in their operation, creating one duty to the public and a separate duty to individuals; but because as one of the public in a peculiar situation, he suffers a special

¹The plaintiff claimed that under the terms of the statute he, though without a license, was entitled to drive it because "accompanied by a licensed chauffeur."

injury, different in kind from that of the public generally, from the neglect of the public duty.²

If we consider the effect of such a violation of law by a plaintiff, upon his right to recover, the principles that have been recognized are instructive. They were considered long ago in connection with our Sunday law. It has been established from early times that one who is violating a criminal law can not recover for an injury to which his criminality was a directly contributing cause.³ It was early held in this State that one travelling in violation of the statutes as to the observance of the Lord's day, could not recover for an injury received while so travelling. *Smith v. Boston & Maine Railroad*, 120 Mass. 490 and cases cited. *Lyons v. Desotelle*, 124 Mass. 387. *Day v. Highland Street Railway*, 135 Mass. 113. *White v. Lang*, 128 Mass. 598. *McGrath v. Merwin*, 112 Mass. 467. These decisions on the Sunday law have been much criticised in the opinions of other courts and by writers of textbooks. *Broschart v. Tuttle*, 59 Conn. 1. *Sutton v. Wauwatosa*, 29 Wis. 21. *Baker v. Portland*, 58 Maine, 199. *Baldwin v. Barney*, 12 R. I. 392. *Johnson v. Irasburgh*, 47 Vt. 28. *Platz v. Cohoes*, 89 N. Y. 219. The ground of the criticism may be stated in a word, as a supposed failure to distinguish between criminality which is a cause, and criminality which is a mere condition of an injury for which recovery is sought. But this distinction is now thoroughly established in our law. *Newcomb v. Boston Protective Department*, 146 Mass. 596. *Farrell v. Sturtevant Co.*, 194 Mass. 431, 434. *Moran v. Dickinson*, 204 Mass. 559, 562. The Sunday law, so called, has been repealed as to its effect as a bar to recovery in actions of tort showing a violation of it by the plaintiff. R. L. c. 98, § 17. The old case of *Gregg v. Wyman*, 4 Cush. 322, as to the effect of the Sunday law in barring a claim in trover against one who had driven a horse hired for service on Sunday to a different place from that agreed upon, was overruled by this court before the partial repeal of the Sunday law. *Hall v. Corcoran*, 107 Mass. 251. Other cases have been decided, in which it was held that illegality of the plaintiff was no bar to his recovery for an injury, unless his illegality was a cause directly contributing to the injury. *Damon v. Scituate*, 119 Mass. 66. *Smith v. Gardner*, 11 Gray, 418. *Dudley v. Northampton Street Railway*, 202 Mass. 443, 446. *Moran v. Dickinson*, 204 Mass. 559.

The only matter which seems to be left doubtful under our de-

² Compare the statement of the same judge twenty-three years earlier in *Newcomb v. Boston Protective*, 146 Mass. 596 (1888), "It may be, where a penal statute does not purport to create a civil liability, or to protect the rights of particular persons, that a violation of it will not subject the violator to an action for damages," but see *Watts v. Montgomery Trac. Co.*, 175 Ala. 102 (1912), holding that in order that a plaintiff shall be barred from recovery by a violation of a statute, not only must "the violation contribute to his injury but the statute must also have been enacted for the benefit of the party who seeks to invoke its violation as distinguished from the public generally," with which compare *Southern R. Co. v. Rice*, 115 Va. 235 (1913) and *Weller v. Chicago, M. & St. P. R. Co.*, 120 Mo. 635 (1893).

³ See *Southern R. Co. v. Rice*, 115 Va. 235 (1913), and *Weller v. Chicago, M. & St. P. R. Co.*, 120 Mo. 635 (1893).

cisions in this class of cases, is what constitutes "illegality," which is sometimes a directly contributing cause of the injury. Some cases have been decided, which seem to imply that if there is an illegal element entering into a plaintiff's act or conduct, and this act or conduct directly contributes to his injury, he can not recover, although the illegal element or the objectionable quality of the act had no tendency to produce the injury, and the consequences would have been the same under the other existing conditions, if the criminal element had been absent. Another decision seems to turn upon whether the criminal element in the act or conduct, considered by itself alone, operated as a direct cause to produce a result that would not have been produced under the same conditions in other respects, if the criminal element had been absent. This latter seems to be the pivotal question in most cases decided in other States.

The fact that the number of punishable misdemeanors has multiplied many times in recent years, as the relations of men in business and society have grown complex with the increase of population, is a reason why the violation of a criminal statute of slight importance should affect one's civil rights, except when this violation, viewed in reference to the element of criminality intended to be punished, has had a direct effect upon his cause of action. Our decisions seem to have been tending toward the adoption of such a rule. *Welch v. Wesson*, 6 Gray, 505. *Spofford v. Harlow*, 3 Allen, 176. *Steele v. Burkhardt*, 104 Mass. 59. *Damon v. Scituate*, 119 Mass. 66. *Hall v. Ripley*, 119 Mass. 135. *Dudley v. Northampton Street Railway*, 202 Mass. 443, 446. *Moran v. Dickinson*, 204 Mass. 559, 562. *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, 157.

Under particular statutes, we are brought back to the question, what is the legal element which is the essence of the command or prohibition? In most cases, the effect of doing or failing to do that which the law forbids or requires under a penalty, when considered in reference to its relation to one's civil rights in collateral matters, ought to be limited pretty strictly. Take the case of driving without sleighbells in violation of the law of the road. R. L. c. 54, § 3. *Kidder v. Dunstable*, 11 Gray, 342. *Counter v. Couch*, 8 Allen, 436, 437. The requirement of the law is that "No person shall travel on a bridge or way with a sleigh or sled drawn by a horse, unless there are at least three bells attached to some part of the harness." The wrong to be prevented is the failure to have bells while travelling in this way. The travelling in other respects is unobjectionable. The question arises whether the act should be deemed illegal as a whole, in reference to the rule that the courts will not aid one to obtain the fruits of his disobedience of law, or whether in this aspect its different qualities may be considered separately. It is possible to decide this question either way, but we think it is more consistent with justice and with the course of decision elsewhere, to hold that, in reference to the law of negligence and the rule as to rejection of causes of action that are founded on illegality, an act may be considered in its different aspects in its relation to the cause of action, and if only that part of it which

is innocent affects the cause of action, the existence of an illegal element is immaterial. We do not think, under this statute, that one who drives in a sleigh without bells should be treated as a trespasser on the highway, although he is punishable criminally for the failure to have the bells attached to the harness, and is liable in damages to any member of the public who suffers a special injury by reason of this failure.

Consider the St. 1909, c. 514, § 74, which forbids, under a penalty, the regular operation of any elevator by a person under the age of sixteen years, and the regular operation of any rapidly running elevator by a person under the age of eighteen years. If a person under the prescribed age, while employed to operate an elevator, is injured through the negligence of the owner, in leaving it in an unsafe condition, shall his violation of the statute by entering this service before reaching the prescribed age, be treated as criminality, entering into every one of his acts in moving the elevator, so as to prevent his recovery for an injury from the joint effect of his employer's negligence and his own application of the power to raise or lower the elevator? We think it better to hold, if his age and the degree of his competency, which might depend in part upon his age, had no causal connection with the injury, that his criminality was not a direct cause of the injury. In other words, that the punishable element in the act is only disobedience as to age, and although his act in applying the power to the elevator which brought him in contact with the defect, is punishable, and in a sense illegal because of the existence of that element, in determining the relation of his conduct to the cause of action, to see whether the court will aid him in the prosecution of it, we ought to limit the illegality to that part of his conduct towards which the statute is particularly directed. We are to consider the specific thing at which the statute is aimed, and the immediate effect that it was intended directly and proximately to accomplish by its command or prohibition. A question of this kind arose in *Murphy v. Russell*, 202 Mass. 480, but it was not referred to in the opinion, as the case was decided on other grounds. Substantially this question was decided in *Moran v. Dickinson*, 204 Mass. 559.

Take the provision in St. 1903, c. 473, § 5, that "No person shall operate an automobile or motorcycle for hire, unless specifically licensed by the commission so to do," and the earlier provision in the same section that no person shall "operate an automobile or motorcycle upon any public highway or private way laid out under authority of statute unless licensed so to do under the provisions of this act." The operating of the automobile in itself is unobjectionable. The illegal element in the act is the failure to have a license. The purpose of the requirement of a license is to secure competency in the operator. If in any case the failure to have a license, looking to those conditions that ordinarily accompany the failure to have it, is a cause contributing directly to an injury, a violator of the law would be legally responsible to another person injured by the failure; or, if he is injured himself, would

be precluded from recovery against another person who negligently contributed to the injury. But we are of opinion that his failure in that respect is only evidence of negligence in reference to his fitness to operate a car, and to his skill in the actual management of it, unless in the case of the plaintiff, it is shown to be a contributing cause to the injury sued for, in which case it is a bar to recovery.⁴ We think that the operation of a car without a license, while it is a punishable act, does not render the operator a trespasser on the highway, but that the illegal element in the act is only the failure to have a license while operating it, so that if the operation and movement contributed to the accident with which the want of a license had no connection, except as a mere condition, they would not preclude the operator as a plaintiff from recovery. If the illegal quality of the act had no tendency to cause the accident, the fact that the act is punishable because of the illegality, ought not to preclude one from recovery for harmful results to which, without negligence, the innocent features of the act alone contributed.

The other part of this statute, relative to the licensing of automobiles, has been construed differently. In *Dudley v. Northampton Street Railway*, 202 Mass. 443, because of the peculiar provisions of the statute and the dangers and evils that it was intended to prevent, it was decided, after much consideration, that the having of such a machine in operation on the street, without a license,⁵ was the very essence of the illegality and that the illegality was inseparable from the movement of the automobile upon the street at any time, for a single foot; that in such movement the machine was an outlaw, and any person on the street as an occupant of the automobile, participating in the movement of it, was for the time being a trespasser.⁶ Some of us were disinclined to lay down the law so broadly, and the opinion of the court was not unanimous; but the doctrine has been repeatedly reaffirmed and is now the established law of the Commonwealth, *Feeley v. Melrose*, 205 Mass. 329. *Chase v. New York Central and Hudson River Railroad*, 208 Mass. 137, 158.⁷ The difference between this provision of the stat-

⁴ See *Conroy v. Mather*, 104 N. E. 487 (Mass. 1914).

⁵ The plaintiff in *Dudley v. Ry.* was the owner of an automobile in Connecticut and his property was properly registered in that state. The statute allowed residents of other states to drive their automobiles in Massachusetts for a space of fifteen days without obtaining a Massachusetts registration. The accident occurred on the sixteenth day after the plaintiff had entered Massachusetts and one of the questions presented in the case was whether under the special circumstances his fifteen days had expired.

⁶ Compare *Johnson v. Irasburgh*, 47 Vt. 28 (1874), cited in note to *Platz v. Cohoes*, post, and see *Seaboard Air Line R. Co. v. Chapman*, 4 Ga. App. 707 (1908), where it was held that the defendant railway owed no duty of careful operation to one of its engineers who was trying to enter the cab of his engine when drunk, which was by statute a criminal offense.

⁷ In *Feeley v. Melrose*, 205 Mass. 329 (1910), the plaintiffs were the owner and the guests in an automobile recently purchased, which remained registered under the name of the original owner; while in *Chase v. New York Central & H. R. R. Co.*, 208 Mass. 137 (1911), there was a somewhat similar situation. In *Chase v. N. Y. R. Co.*, the plaintiff was injured by a collision at a level crossing by the improper operation of the train crossing the

ute and that involved in the present case is in part one of form, but in connection with the form, it is still more the seeming purpose and intent of the Legislature as to permitting such machines upon the public ways without adequate means of identifying them and ascertaining their owner, together with the requirement, that the machine itself, as a thing of power, shall have its own registration and legalization, the evidence of which it shall always carry with it. In the last of the cases cited in this language: "Under the decisions, the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law." * * * ("In going along the way * * * the machine is an outlaw."⁸) "The operator, in running it there and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law," ("and which directly contributes to the injury").

We are of opinion that the law of these last cases should not be extended to the provision of the statute requiring every operator to have a personal license to operate the car. The jury should have been instructed that the defendant's failure to have a license was only evidence of his negligence as to the management of the car.

Exceptions sustained.

PLATZ v. THE CITY OF COHOES.

Court of Appeals of New York, 1882. 89 N. Y. 219.

DANFORTH, J. The defendant made an excavation in one of its public streets, and neither removing or leveling the earth taken therefrom, left it in the way. While the respondent was riding with her husband, the carriage in which they were was, without carelessness on the part of either, upset by the pile of earth, and she was injured. That the street was defective through the culpable omission of duty on the part of the defendant is not denied, but

highway on which he was travelling, while in *Feely v. Melrose*, the automobile fell into an obstruction in the highway and the action was brought against the town. In *Holden v. McGillicuddy*, 215 Mass. 563 (1913), the court followed the principal case in an action for injuries received in Vermont where a similar statute was in force.

Contra: Atlantic Coast Line R. Co. v. Weir, 63 Fla. 69 (1912) and *Lockridge v. Minneapolis & St. L. R. Co.*, 140 N. W. 834 (Iowa 1913), in both of which states the provisions of the respective statutes being practically identical with the Massachusetts statute; in *Hemming v. New Haven*, 82 Conn. 661 (1910), the owner of an unregistered automobile was allowed to recover for injuries received, due to the bad condition of the highway, but the court distinguishes the case in hand from the principal case on the ground that the Connecticut statute did not prohibit the use of unregistered automobiles upon public highways but merely imposed a penalty for their use.

⁸ Even the owner or occupant of an unregistered automobile has the same rights as other trespassers in Massachusetts to be "exempt from reckless, wanton, or wilful injury," *Dudley v. Northampton St. R. Co.*

the accident happened on Sunday, and the learned counsel for the appellant claims that it owed no duty to the plaintiff to keep its streets in repair on that day, because it did not appear that she was then traveling "either from necessity or charity," nor for any purpose permitted by the law. It is plain, therefore, that she was violating the statute relating to the "observance of Sunday" (1 R. S. 628, title 8, chap. 20, art. 8, § 70), but we do not perceive how that fact relieves the defendant.

It imposed an obligation upon the plaintiff to refrain from traveling, and for its violation prescribed a forfeiture of one dollar. It also declares that upon complaint made before a magistrate, and conviction had, that sum might be collected by distress and sale of the goods and chattels of the offender, or if sufficient could not be found, she might be "committed to the common jail for not less than one or more than three days." The statute goes no further, and we are aware of no principle upon which it can be held that the right to maintain an action in respect of special damage resulting from the omission of a defendant to perform a public duty is taken away because the person injured was at the time disobeying a positive law. In *Carroll v. Staten Island R. R. Co.* (58 N. Y. 126; 17 Am. Rep. 221), an action by a passenger against a carrier to recover damages for injuries received through its carelessness, this court held that the fact, "that the plaintiff was at the time of the injury traveling contrary to the statute," was no defense to the action. The policy of the statute and its limitations were then considered, and the court refused to add to the penalty imposed by it a forfeiture of the right to indemnity for an injury resulting from the defendant's negligence.

The Sunday law received a similar construction in *Phila., Wil. & Balt. R. R. Co. v. Phila. & Havre de Grace Steam Towboat Co.* (23 How. U. S. Sup. Ct. Rep. 209), the court holding that the offender, the plaintiff in the action, was liable to the fine or penalty imposed thereby, and nothing more, saying "We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of \$7,000 on the libelants, by way of set-off, because their servants may have been subject to a penalty of twenty shillings each for breach of the statute." To the same effect is *Baldwin v. Barney* (12 R. I. 392; 34 Am. Rep. 670).

It may indeed be said that if the plaintiff had obeyed the law, remained at home, and not traveled, the accident would not have happened. That is not enough. The same obedience to the law would have saved the plaintiffs in the cases just cited. It must appear that the disobedience contributed to the accident, or that the statute created a right in the defendant, which it could enforce. But the object of the statute is the promotion of public order, and not the advantage of individuals. The traveler is not declared to be a trespasser upon the street, nor was the defendant appointed to close it against her. In such an action the fault which prevents a recovery is one which directly contributes to the accident; as carelessness in driving, either a vicious or unmanageable horse, or at

an improper rate of speed, or without observation of the road, or in an insufficient vehicle, or with a defective harness, or in a state of intoxication, or under some other condition of driver, horse or carriage, which may be seen to have brought about the injury.

It may doubtless be said that if the plaintiff had not traveled, she would not have been injured; and this will apply to nearly every case of collision or personal injury from the negligence or wilful act of another. Had the injured party not been present he would not have been hurt. But the act of travel is not one which usually results in injury. It, therefore, can not be regarded as the immediate cause of the accident, and of such only the law takes notice. At common law the act was not unlawful, and the plaintiff was still under its protection, and may resort to it against a wrong-doer by whose act she was injured. This has been held in many cases where the person injured was at the time doing an act prohibited by the city ordinance or general statute (*Steele v. Burkhardt*, 104 Mass. 59; *Welch v. Wesson*, 6 Gray, 505; *Norris v. Litchfield*, 35 N. H. 271), and even violating the law now in question, or one similar to it. *Carroll v. Staten Island Co.*, and *Phila., Wil. & Balt. R. R. Co. v. Phila. & Havre de Grace Towboat Co.* have already been referred to. (See, also, *Schmid v. Humphreys*, 48 Iowa, 652; 30 Am. Rep. 414.)

Sutton v. The Town of Wauwatosa (29 Wis. 21; 9 Am. Rep. 534) is in point, not only in its circumstances but in the relations of the parties. The plaintiff was driving his cattle to market on Sunday, and they were injured by the breaking down of a defective bridge which the defendant, through negligence, had failed properly to maintain. The Sunday statute was relied upon, but the town was held liable.

There are, as the counsel for the appellant contends, authorities the other way. Decisions by very eminent and learned courts. In Vermont. (*Johnson v. Town of Irasburgh*, 47 Vt. 28; 19 Am. Rep. 111; *Holcomb v. Town of Danby*, 51 Vt. 428.) In Massachusetts. (*Bosworth v. Swansey*, 10 Metc. 363; *Jones v. Andover*, 10 Allen, 18.) And immunity is also given by that court, under the same statute, to a railroad corporation through whose negligence the plaintiff was injured. (*Smith v. Boston & Maine R. R.*, 120 Mass. 490; 21 Am. Rep. 538.) But the decisions already made by us (*Merritt v. Earle*, 29 N. Y. 115; *Wood v. Erie Ry. Co.*, 72 id. 196; 28 Am. Rep. 125; *Carroll v. Staten Island R. R. Co.*, *supra*) are in the contrary direction, and are sustained, we think, by reasons of justice and public policy. In *Baldwin v. Barney* (*supra*) a question arising under the Sunday laws of Massachusetts came before the court in an action by one injured in that State, while traveling on Sunday, by the reckless driving of one also traveling. On the trial the plaintiff was nonsuited, but on appeal the Massachusetts cases are reviewed and disapproved, and after a very deliberate discussion of the decisions in that and other states the court held that the defendant could not show the illegality of the plaintiff's act as a defense, and the nonsuit was set aside. There will be seen great con-

flict in decided cases, but the weight of authority seems to favor the conclusion reached by us. (Cooley on Torts, § 157; Wharton on Negligence, § 331.)

This result disposes of the appellant's objections, for they all rest on the assumption that as one could not lawfully travel on Sunday, there was negligence either of the plaintiff or her husband, and if of the latter, that it was to be imputed to her.

It is not necessary to consider whether, if a different condition had been established, the negligence of the husband in those respects could have been imputed to the wife. The defense relied upon, was the Sunday law, and as it is not available, the judgment appealed from should be affirmed with costs.

All concur, except Finch, J., taking no part, and Tracy, J., absent.

Judgment affirmed.¹

CHAPTER IV.

Causal Connection Between the Plaintiff's Conduct and Injury.

SMITHWICK v. HALL & UPSON CO.

Supreme Court of Errors of Connecticut, 1890. 59 Conn. 261.

TORRANCE, J. The general question reserved for our advice in this case, is, whether the plaintiff upon the facts found is entitled to the substantial damages or only to the nominal damages found by the court below.

Inasmuch as the court has expressly found that the negligence

¹ *Accord*: the following cases hold that one travelling on Sunday may recover for injuries received from the bad condition of the highway or by the negligence of fellow travellers or others, *Black v. Lewiston*, 2 Idaho 276 (1887); *Kansas City v. Orr*, 62 Kans. 61 (1900); *Corey v. Bath*, 35 N. H. 530 (1857); *Mohney v. Cook*, 26 Pa. 342 (1855); *Sutton v. Wauwatosa*, 29 Wis. 21 (1871); *Schmid v. Humphrey*, 48 Iowa 652 (1878); *Delaware L. & W. R. Co. v. Trautwein*, 52 N. J. L. 169 (1889); *Baldwin v. Barney*, 12 R. I. 392 (1879); *Knowlton v. Milwaukee R. Co.*, 59 Wis. 278 (1884). So a passenger travelling on Sunday may recover for injuries due to the negligence of his carrier, though the contract of carriage is illegal; *Chicago St. Louis & Pittsburgh R. Co. v. Graham*, 3 Ind. App. 28 (1891); *Opsahl v. Judd*, 30 Minn. 126 (1883), nor is it a bar to recovery, whether against a master or others, that the plaintiff was working on Sunday, *Atlanta Steel Co. v. Hughes*, 136 Ga. 511 (1911); *Taylor v. Star Coal Co.*, 110 Iowa 40 (1899); *Illinois Cent. R. Co. v. Dick*, 91 Ky. 434 (1891); *Louisville New Albany & Chicago R. Co. v. Buck*, 116 Ind. 566 (1888), and *Hoadley v. International Paper Co.*, 72 Vt. 79 (1899).

Contra: the Massachusetts cases cited in the opinion of Knowlton, C. J. in *Bourne v. Witman*, *post*; *Hinckley v. Penobscot*, 42 Maine 89 (1856); *Bryant v. Biddeford*, 39 Maine 193 (1855); compare with the last two cases *Baker v. Portland*, 58 Maine 199 (1870), as to which see *Beacham v. Portsmouth Bridge*, 68 N. H. 382 (1895). In *Johnson v. Irasburgh*, 47 Vt. 28 (1874), the court, while following the reasoning of the principal case to the effect that travelling on Sunday is a condition and not a cause of an injury sustained by a defect in a highway and that travelling on Sunday being an

of the defendant caused or contributed to the injury for which the plaintiff seeks to recover, the decision of the above general question depends upon this single point, namely, whether the acts and conduct of the plaintiff as set forth upon the record constitute or amount to such contributory negligence on his part as will bar his right to substantial damages. The facts found, so far as they bear upon the question for decision, are in substance the following:—

The plaintiff was a workman in the service of the defendant, and at the time of the injury complained of was engaged in helping to store ice for the defendant in a certain brick building. In doing this work the plaintiff stood upon a platform about five feet wide and seventeen feet long, raised fifteen feet above the ground, and extending from the west side of the building easterly to a point about two feet east of the door or aperture through which the ice was taken into the building. A stout plank of suitable height and strength extended along the outer side of the platform as far as the west side of the door and served as a protective railing or guard to that portion of the platform. In front of the door and east of it the platform was without guard or railing of any kind. A short time prior to the injury the foreman of the defendant stationed the plaintiff on the platform just west of the door and inside the railing, and showed him what his duties were there, and told him "not to go upon the east end of the platform east of the slide and door, as it was not safe to stand there." He did not tell the plaintiff why it was not safe, but the danger which he had in mind was the narrowness and unrailed condition of the platform and the liability by inadvertence to misstep or fall or slip off, the latter being aggravated by the liability of the platform to become slippery from broken ice. These dangers were all manifest. The peril resulting from the accident which happened to the building was not in contemplation.

After the foreman went away the plaintiff, in spite of the orders so given him, and for reasons of his own apparently, went over to the east end of the platform and worked there. It is found that there was no sufficient reason or excuse for the change of position. One of his fellow workmen, seeing the plaintiff in that place, told him that "it was not safe, and to stand on the other side," but the plaintiff, notwithstanding such warning, remained at work there.

While so at work the brick wall of the building above the platform, in consequence of the negligence of the defendant, gave way, the brick falling upon the platform and thence to the ground. The plaintiff was struck by portions of the descending mass and fell to the earth. He was either knocked off, or his fall, in the condition in which he stood, was inevitable; indeed, had he not fallen when he did, his injuries, which were very serious, would have been worse.

offense not against a town, but against public morals, should not entail a forfeiture of the right of action, holds that the liability of the Vermont towns to maintain their highway in repair, being imposed by statute, extends only to such persons as are lawfully travelling thereon and so the town owes no duty of this sort to persons travelling on Sunday. Compare with this case *Holly v. International Paper Co.*, 79 Vt. 79 (1899).

Most of the injuries which he actually sustained were occasioned by the fall.

The plaintiff had no knowledge that the wall would be likely to fall or was in any way unsafe, and it is found that "no fault or negligence can be imputed to him in this regard."

In contemplation of the peril from the falling wall, it is found that "the spot where the plaintiff stood could not have been considered more dangerous than the place where he was directed to stand, though in fact most of the brick fell upon the side where he stood, and the result demonstrated therefore that the other side would have been safer in the event which occurred."

Upon these facts the defendant contends that the plaintiff, in going to and remaining on the east end of the platform, contrary to the orders and in spite of the warning given him, and in view of the obvious and manifest danger in so doing, was guilty of such contributory negligence as bars him of his right to recover more than nominal damages.

If the plaintiff's injuries had resulted from any of the perils and dangers attendant upon the mere fact of his standing and working on the east end of the platform, which were obvious and manifest to any one in his place, which were in the mind of the foreman when he told the plaintiff not to go there, and in view of which his fellow workman warned him, then this claim of the defendant would be a valid one. But upon the facts found it is without foundation.

The injury to the plaintiff was not the result of any such dangers, but was caused through the negligence of the defendant by the falling walls. This was a source of danger of which he had no knowledge whatever. He was justified in supposing that the wall was safe and would not be likely to fall upon him, no matter where he stood on the platform. He had no reason to anticipate even the slightest danger from that source before or after he changed his position. This being so, he could be guilty of no negligence with respect to this source of danger by changing his position contrary to orders; for negligence presupposes a duty of taking care, and this in turn presupposes knowledge or its legal equivalent.

With respect to that danger the plaintiff upon the facts found must be held to have acted as any reasonably careful man would have acted under the same circumstances. In changing his position contrary to orders he voluntarily took the risk of all perils and dangers which a man of ordinary care in his place ought to have known or could reasonably have anticipated; but as to dangers arising through the defendant's negligence from other sources—dangers which he was not bound to anticipate and of whose existence he had no knowledge, he took no risk and assumed no duty of taking care. It was the duty of the defendant on the facts found to warn the plaintiff against the danger from the falling wall.

Now the act of omission of a party injured which amounts to what is called contributory negligence, must be a negligent act or omission, and in the production of the injury it must operate as

a proximate cause or one of the proximate causes, and not merely as a condition.

In the case at bar the conduct of the plaintiff, as we have seen, was, with respect to the danger from the falling wall, not negligent for the want of knowledge or its equivalent on the part of the plaintiff.

Nor was his conduct, legally considered, a cause of the injury. It was a condition rather.

If he had not changed his position he might not have been hurt. And so too if he had never been born, or had remained at home on the day of the injury, it would not have happened; yet no one would claim that his birth or his not remaining at home that day, can in any just or legal sense be deemed a cause of the injury.

The court below has found that the plaintiff's fall in the position in which he stood was due to the giving-way of the wall, and that most of his injuries were occasioned by the fall. His position there, upon the facts found, can no more be considered as a cause of the injury, than it could be in a case where the defendant, in doing some act near the platform without the plaintiff's knowledge, had negligently knocked him to the ground, or had negligently hit him with a stone. Had the injury been occasioned by a misstep or slip from the platform by the carelessness of the plaintiff, or for the want of a railing, the causal connection between the change of position and the injury would, legally speaking, be quite obvious; but from a legal point of view no such connection exists between the change of position and the giving way of the wall.

The plaintiff had full knowledge of and was abundantly cautioned against certain particular sources of peril and danger, and he voluntarily neglected the warnings and took the risk of those perils and dangers. He was injured through the negligence of the defendant from an entirely different source of danger, of which he knew and could know nothing, and of whose existence it was the duty of the defendant to warn him.

Under these circumstances the failure or neglect to heed the warning does not constitute contributory negligence. *Gray v. Scott*, 66 Penn. St., 345.

In the case above cited certain boys had been warned not to play at a certain point because of some particular and obvious dangers existing there. They failed to heed the warning, and one of them, playing at that place, was killed. His death was caused by the negligence of another and came from a source of danger not obvious and entirely different from any the boys had been warned against.

In answering the argument that the boy's failure to heed the warnings was a cause of his death and contributory negligence, the court says:—"But because he was under the tramway in the passage below it is thought he was guilty of contributory negligence. He could not be guilty of negligence as to the defendant without there was some reason to expect danger and a duty of care on his part in relation to it. There was ordinarily none. He had a right

therefore to suppose everything secure and safely managed on the tramway, and because it was not he was killed. Precisely the same argument could have been used if the boy had been killed in that place by the negligent use of firearms discharged a hundred yards off."

The defendant seems to claim however that, although some of the plaintiff's injuries were caused by falling bricks, yet most of them were caused by his fall; and that as he probably would not have fallen had he remained behind the railing, he contributed to his injury by placing himself where in case of such accident there was nothing to prevent his fall.

Whether the claim that he would probably not have fallen had he remained where he was stationed be true or not, must forever remain matter of conjecture. But if its truth could be demonstrated it would not, as we have seen, change the relation of the plaintiff's act to the legal cause of his injury, or make that act, from a legal standpoint, a contributing cause when it was but a condition.¹

And if the claim means that the plaintiff by his act increased the injury merely, then if this were true it would not be such contributory negligence as would defeat the action. To have that effect it must be an act or omission which contributes to the happening of the act or event which caused the injury. An act or omission that merely increases or adds to the extent of the loss or injury will not have that effect, though of course it may affect the amount of damages recovered in a given case. *Gould v. McKenna*, 86 Penn. St., 297; *Stebbins v. Central R. R. Co.*, 54 Verm., 464. This claim however, on the facts found, is wholly without foundation.

The plaintiff is entitled to a judgment in his favor for one thousand dollars, and the Superior Court is so advised.

In this opinion the other judges concurred.²

¹ But see *Thane v. Traction Co.* and *Crampton v. Izie Bros.*, *infra*, note 2.

² Accord: *Wagner v. Mo. Pac. R. Co.*, 97 Mo. 512 (1888); *Woolery v. Louisville N. A. & C. R. Co.*, 107 Ind. 381 (1886); *New York, L. E. & W. R. Co. v. Ball*, 53 N. J. L. 283 (1891); *Webster v. Rome W. & O. R. Co.*, 115 N. Y. 112 (1889), passengers riding in baggage car, which rules of the company forbade them to occupy, held entitled to recover for injuries received in a collision but not for those received by reason of the dangers peculiar to their nature and the use of the baggage car. See also, the cases cited and attempted to be distinguished by Paxson, J. in *Pa. R. Co. v. Langdon*, 92 Pa. 21 (1879), *contra*, where a curious distinction is drawn between the effect of the conductor's permission to the passenger to violate rules intended for the convenience of the carrier and a similar permission to violate rules intended to preserve the safety of passengers.

In *Thirteenth & Fifteenth St. Passenger R. v. Boudron*, 92 Pa. 475 (1880), *Dewire v. Boston & M. R. Co.*, 148 Mass. 343 (1889) and *Burns v. Bellefontaine R. Co.*, 50 Mo. 139 (1872), the passenger was allowed to recover for the injury received in a rear end collision although he was at the time riding on the rear platform of a horse car; in *Watson v. Portland & Cape Elizabeth R. Co.*, 91 Maine 584 (1898), it was held that a passenger on the front platform of an electric street car, whose fare is accepted by the conductor knowing his exposed position, while taking upon himself the duty of looking out for the usual obvious cares of his position such as the jolts and swerves inevitable in rapid transit, was not guilty of negligence barring him from recovery for injuries received by being thrown from the platform by the

SHARRER v. PAXSON et al.

Supreme Court of Pennsylvania, 1895. 171 Pa. 26.

MR. JUSTICE MCCOLLUM. The jury found that the plaintiff's husband was standing upon the step of the car with a firm hold on each side rail, and that while in this position the company's servant broke his hold on the rails and pushed from the step, and that in consequence of this action of the servant he received the injury which resulted in his death. The evidence was sufficient to warrant the finding, and the instructions in regard to it were clear and impartial. It is contended however that, inasmuch as the deceased reached the position from which he was pushed while the train was moving, his own negligence contributed to his death and is a bar to this action. The attempt to board a moving train is undoubtedly a negligent and hazardous act, but if it is successful and the negligent party gets safely upon the car it will not justify or excuse the subsequent negligence of the company or its servants, by which he is injured. The rights of Sharrer in the position from which he was thrown were the same as if he had taken it before the train started, or as the rights of a passenger who while the train is moving leaves his seat in the body of the car and stands on the platform of it. He was on the car when the negligence of the company intervened and hurled him from it. His presence there was not the proximate cause of his death. The peril involved in getting there was passed, and the negligence or misconduct of which he was the victim was not included in the risks to which his position exposed him: *Passenger Railway v. Boudrou*, 92 Pa. 475. If he had been thrown from the car by an ordinary jolt of it, as was

jarring and jolting caused by the motorman improperly running into an open switch; and see *Cattano v. Metropolitan St. R. Co.*, 173 N. Y. 565 (1903).

In Massachusetts it is held that where a passenger rides on a platform the use of which is prohibited, or upon which the passengers are allowed to ride at their own risk, he may not recover for any injury received by the negligent operation of the car while he is riding thereon or while he is attempting to alight therefrom, *Burns v. Boston Elevated R. Co.*, 183 Mass. 96 (1903).

As to the right of a passenger to recover if struck by an object near the track while he is riding upon the running board or step of an electric car, compare *Bumbar v. United Trac. Co.*, 198 Pa. St. 198 (1901) with *Ramsey v. Pottstown & Reading St. R. Co.*, 35 Sup. Ct. 598 (Pa. 1908) and *Wood v. Chester Trac. Co.*, 36 Sup. Ct. 483 (Pa. 1908); and see *Denver etc. Co. v. Dwyer*, 20 Colo. 132 (1894). See, also, *Crampton v. Ivie Bros.*, 126 N. Car. 894 (1900), intimating that the plaintiff, who so sat in a buggy that a mere jolt might throw him off, could not recover, if thrown therefrom by a collision with the defendant's negligently driven vehicle.

On the other hand it was held in *Thane v. Scranton Trac. Co.*, 8 Sup. Ct. 446 (1898), 191 Pa. St. 249 (1899), that a passenger unnecessarily standing on a rear platform could not recover for injuries received in a rear end collision; while in *Nichols v. Detroit Elec. R. Co.*, 128 Mich. 486 (1901), it was held that a boy riding on the rear buffer of a street railway car could not recover for an injury received in a slight collision with the car following it. In each case, however, there was a vigorous dissenting opinion; in the first by Peter P. Smith, J., 8 Pa. Sup. Ct. 451, especially 454, and in the second case by Judge Moore, with whom concurred Montgomery, C. J.

the plaintiff in *Railroad Co. v. Hoosey*, 99 Pa. 492, he might have been considered as having voluntarily exposed himself to or assumed a risk incident to his position and thereby cause or contributed to the injury he received. But he had no reason to anticipate the act which caused his death, and to push him from the step under the circumstances established by the verdict was as great an outrage as to push from the platform while the train is moving any passenger who may be found standing upon it. The negligence of the deceased in attempting to get on the moving car can not relieve the company from responsibility for the consequences of the negligent act committed by its employee after the former accomplished his purpose. He was lawfully upon the steps of the car and entitled to the rights of a passenger in it. This sufficiently appeared by the ticket in his possession. The risk he ran in getting there was no abridgment of his right to pass from the step to the platform and thence to a seat in the car.

Judgment affirmed.

BOULFROIS v. UNITED TRACTION COMPANY.

Supreme Court of Pennsylvania, 1904. 210 Pa. 263.

MR. JUSTICE DEAN. We desire it to be distinctly understood that in *Powelson v. United Traction Co.*, 204 Pa. 474; *Hunterson v. Traction Co.*, 205 Pa. 568 and *Bainbridge v. Traction Co.*, 206 Pa. 71, we had no intention of relaxing the well-established rule, "That to get on or off a moving car, whether propelled by steam or electricity, is negligence per se in him who attempts it."¹ From the whole evidence in this case, it did not necessarily and certainly follow that Armand Boulfrois, Jr., the injured person, was either negligent or not negligent. If the car had not stopped when he attempted to get on, and by that attempt he was injured, he was negligent and can not recover; if it either had, or had not stopped and he was safely on, then if the conductor, by suddenly and recklessly turning on the power gave the car a jerk which threw the boy off, it was the conductor's negligence that caused the injury and he can recover. If the boy's attempt to get on was not complete, if he was still engaged in the attempt, when the car was jerked, the inceptional act of negligence when he stepped from the ground onto a moving car, still continued and he can not recover.² If he was negligent in getting on, as from his own testimony he was, then when safely on before he had time to get seated,

¹ A judgment on a verdict for the plaintiff was reversed because the trial judge had instructed the jury that the attempt to board the moving car was not negligent, "if the motion of the car was such as to induce the plaintiff to believe that it was about to stop or was such, that he or any reasonable person would be induced to believe that he could get on with safety."

² Accord: *Bradney v. Phila. Rapid Transit Co.*, 232 Pa. St. 127 (1911). Compare *Washington etc. R. v. Harmon and People Pass. R. Co. v. Green, R. v. Armstrong and Cawfield v. Asheville R. Co.*, cited in Note 1 to *Teakle v. San Pedro etc. R. R.*, ante, p. 1388.

the conductor by suddenly turning on the power threw him off, it was the conductor's negligence which caused the injury and defendant is answerable.

Was the act of getting on complete, when the jerk threw him off? If it was complete then the company's negligence caused the accident, just as clearly as if some other passenger, on his feet looking for a seat, was thrown violently to the floor or thrown off by a sudden jerk of the car by a reckless conductor. The boy's good luck in reaching the running board in safety did not condone the negligent act of getting on, if he was not yet safely on when thrown off. We have tried to make our meaning plain: if we have failed it is either because our obtuseness of perception or poverty of language fails to make plain to others what is plain to us.

BERRY v. SUGAR NOTCH BOROUGH.

Supreme Court of Pennsylvania, 1899. 191 Pa. 345.

MR. JUSTICE FELL. The plaintiff was a motorman in the employ of the Wilkes-Barre and Wyoming Valley Traction Company on its line running from Wilkes-Barre to the borough of Sugar Notch. The ordinance by virtue of which the company was permitted to lay its track and operate its cars in the borough of Sugar Notch contained a provision that the speed of the cars while on the streets of the borough should not exceed eight miles an hour. On the line of the road, and within the borough limits, there was a large chestnut tree, as to the condition of which there was some dispute at the trial. The question of the negligence of the borough in permitting it to remain must, however, be considered as set at rest by the verdict. On the day of the accident the plaintiff was running his car on the borough street in a violent wind-storm, and as he passed under the tree it was blown down, crushing the roof of the car and causing the plaintiff's injury. There was some conflict of testimony as to the speed at which the car was running, but it seems to be fairly well established that it was considerably in excess of the rate permitted by the borough ordinance.

We do not think that the fact that the plaintiff was running his car at a higher rate of speed than eight miles an hour affects his right to recover. It may be that in doing so he violated the ordinance by virtue of which the company was permitted to operate its cars in the streets of the borough, but he certainly was not for that reason without rights upon the streets. Nor can it be said that the speed was the cause of the accident, or contributed to it. It might have been otherwise if the tree had fallen before the car reached it; for in that case a high rate of speed might have rendered it impossible for the plaintiff to avoid a collision which he either foresaw or should have foreseen. Even in that case the ground for denying him the right to recover would be that he had been guilty of contributory negligence, and not that he had violated

a borough ordinance. The testimony however shows that the tree fell upon the car as it passed beneath. With this phase of the case in view, it was urged on behalf of the appellant that the speed was the immediate cause of the plaintiff's injury, inasmuch as it was the particular speed at which he was running which brought the car to the place of the accident at the moment when the tree blew down. This argument, while we can not deny its ingenuity, strikes us, to say the least, as being somewhat sophistical. That his speed brought him to the place of the accident at the moment of the accident was the merest chance, and a thing which no foresight could have predicted. The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety. It was also argued by the appellant's counsel that, even if the speed was not the sole efficient cause of the accident, it at least contributed to its severity, and materially increased the damage. It may be that it did. But what basis could a jury have for finding such to be the case; and, should they so find, what guide could be given them for differentiating between the injury done this man and the injury which would have been done a man in a similar accident on a car running at a speed of eight miles an hour or less?

The judgment is affirmed.

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APPENDIX A.
Master and Servant.

SECTION I.

The "Fellow Servant Rule."

PRIESTLEY v. FOWLER.

Court of Exchequer, 1837. 3 M. & W. 1.

CASE.—The declaration stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant's, in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding *and being carried and conveyed by the said van*, with the said goods; and it became the duty of the defendant on that occasion, to use due and proper care that the said van should be in a proper state of repair, that it should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless, the defendant did not use proper care that the van should be in a sufficient state of repair, or that it should not be overloaded, or that the plaintiff should be safely and securely carried thereby, in consequence of the neglect of all and each of which duties the van gave way and broke down, and the plaintiff was thrown with violence to the ground, and his thigh was thereby fractured, etc.

Plea, not guilty.

At the trial before Park, J., at the Lincolnshire Summer Assizes, 1836, the plaintiff, having given evidence to show that the injury arose from the overloading of the van, and that it was so loaded with the defendant's knowledge, had a verdict for £100. In the following Michaelmas Term, Adams, Serjt., obtained a rule to show cause why the judgment should not be arrested, on the ground that the defendant was not liable in law, under the circumstances stated in the declaration. In Hilary Term,

LORD ABINGER, C. B.—This was a motion in arrest of judgment, after verdict for the plaintiff, upon the insufficiency of the declaration. [His lordship stated the declaration.] It has been objected to this declaration, that it contains no premises from which the duty of the defendant, as therein alleged, can be inferred in law; or, in other words, that from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or

to make the master liable for damage to the servant, arising from any vice or imperfection, unknown to the master, in the carriage, or in the mode of loading and conducting it. For, as the declaration contains no charge that the defendant knew of any of the defects mentioned, the Court is not called upon to decide how far such knowledge on his part of a defect unknown to the servant, would make him liable.

It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other.

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coachmaker, or his harness maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coachmaker, or for a defect in the harness arising from the negligence of the harness maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.

The inconvenience, not to say the absurdity of these consequences, affords a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact,

to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.

We are therefore of opinion that the judgment ought to be arrested.

Rule absolute.

FARWELL v. BOSTON AND WORCESTER RAILROAD CORPORATION.

Supreme Judicial Court of Massachusetts, 1842. 4 Metcalf, 49.

The case was submitted to the Court on the following facts agreed by the parties: "The plaintiff was employed by the defendants, in 1835, as an engineer, and went at first with the merchandise cars, and afterwards with the passenger cars, and so continued till October 30th, 1837, at the wages of two dollars per day; that being the usual wages paid to engine-men, which are higher than the wages paid to a machinist, in which capacity the plaintiff formerly was employed.

"On the 30th of October, 1837, the plaintiff, then being in the employment of the defendants, as such engine-man, and running the passenger train, ran his engine off at a switch on the road, which had been left in a wrong condition, (as alleged by the plaintiff, and, for the purposes of this trial, admitted by the defendants), by one Whitcomb, another servant of the defendants, who had been long in their employment, as a switchman or tender, and had the care of switches on the road, and was a careful and trustworthy servant, in his general character, and as such servant was well known to the plaintiff. By which running off, the plaintiff sustained the injury complained of in his declaration.

"The said Farwell (the plaintiff) and Whitcomb were both appointed by the superintendent of the road, who was in the habit of passing over the same very frequently in the cars, and often rode on the engine.

"If the court shall be of opinion that, as matter of law, the defendants are not liable to the plaintiff, he being a servant of the corporation, and in their employment, for the injury he may have received from the negligence of said Whitcomb, another servant of the corporation, and in their employment, then the plaintiff shall become nonsuit; but if the court shall be of opinion, as matter of law, that the defendants may be liable in this case, then the case shall be submitted to a jury upon the facts which may be proved in the case; the defendants alleging negligence on the part of the plaintiff."

C. G. LORING, for the plaintiff. The defendants, having employed the plaintiff to do a specified duty on the road, were bound to keep the road in such a condition that he might do that duty with safety. If the plaintiff had been a stranger, the defendants would have been liable; and he contends that the case is not varied by the fact that both the plaintiff and Whitcomb were the servants of the defendants; because the plaintiff was not the servant of the defendants in the duty or service, the neglect of which occasioned the injury sustained by him. He was employed for a distinct and separate service, and had no joint agency or power with the other servants whose duty it was to keep the road in order; and could not be made responsible to the defendants for its not being kept in order. He could not, by any vigilance or any power that he could exercise, have prevented the accident. His duties and those of Whitcomb were as distinct and independent of each other, as if they had been servants of different masters.

The plaintiff does not put his case on the ground of the defendants' liability to passengers, nor upon the general principle which renders principals liable for the acts of their agents; but on the ground, that a master, by the nature of his contract with a servant, stipulates for the safety of the servant's employment, so far as the master can regulate the matter.

The defense rests upon an alleged general rule, that a master is not liable to his servant for damage caused by the negligence of a fellow-servant. But if that be sound, as a general rule, it does not apply here; for Whitcomb and the plaintiff, as has already been stated, were not fellow-servants—that is, were not jointly employed for a common purpose.

The case of *Priestley v. Fowler*, 3 Mees. & Welsb. 1, on which the defendants will rely, was rightly decided. The case was clearly one of equal knowledge on the part of the two servants, and of voluntary exposure by the plaintiff to a known hazard not required by his duty; and both servants were jointly engaged in the same business when the accident happened to the plaintiff. But the reasoning and *dicta* of the court went much beyond the case—in undertaking to lay down a general rule, as applying to all cases of damages sustained by a servant in the employment of his master, without discrimination as to the peculiar relations of the servant, and the causes of the injury received by him—and lead to unsound conclusions.

No general rule can be laid down, which will apply to all cases of a master's liability to a servant. But it is submitted that a master is liable to one servant for the negligence of another, when they are engaged in distinct employments, though he is not so liable, where two servants are engaged jointly in the same service; because, in the latter case, each servant has some supervision and control of every other. This principle may be illustrated by the relation which subsists between the owner of a ship and the master and crew. The owner contracts with them to navigate his ship, and of necessity he impliedly contracts that she is capable of navigation—seaworthy for the voyage. And if she prove otherwise, by reason of the care-

lessness of the builder or the shipwright employed to repair her, and the master and crew lose their wages, the owner must be liable and pay a full indemnity; and he has his remedy against the shipwright. See *Eaken v. Thom*, 5 Esp. R. 6. Abbott on Ship. (4th Amer. ed.) 457. In such case, the master and crew have no remedy against the shipwright by whose misconduct they suffer, because there is no privity of contract between him and them. But there is a privity of contract between them and the ship-owner, and this gives a perfect remedy, in the theory of the law. Many similar illustrations of the principle might be given. And unless the servant has a remedy against the master, in such cases, the great fundamental legal rule, that where there is a wrong there is a remedy, is violated or departed from.

In case of servants jointly employed in the same business, it may reasonably be inferred that they take the hazard of injuries from each other's negligence; because such hazard is naturally and necessarily incident to such employment; because they have, to a great extent, the means of guarding against such injuries, by the exercise of mutual caution and prudence, while the master has no such means; and because, between persons employed in a joint service, there is a privity of contract, that renders them liable to each other for their carelessness or neglect in the discharge of such service.

It is a well settled general rule that a servant is not liable to third persons for his neglect of duty. Story on Agency, §§ 308, 309. If that principle applies to this case, so that the plaintiff has no remedy against Whitcomb, it would seem to be a sufficient reason for holding the defendants liable.

It is also a well-established rule, that if an agent, without his own default, has incurred loss or damage in transacting the business of the principal, he is entitled to full compensation. Story on Agency, § 339.

FLETCHER & MOREY, for the defendants. The plaintiff must maintain his action, if at all, either on the rule of *respondet superior*, as for a tort, or on an implied contract of indemnity. The early cases in which masters were held liable to a stranger in an action of tort, for the misconduct of their servants, were mostly those which respected the safety of passengers on highways, and were decided on grounds of policy. The doctrine of such liability was afterwards extended to cases that were deemed analogous. See 1 Bl. Com. 432, *Christian's note*. But no rule of policy requires that masters shall be liable to one servant for injuries received by him from a fellow-servant. On the contrary, policy requires an entirely different rule, especially in the present case. The aim of all the statutes concerning railroads is to protect passengers; and if this action is maintained, it will establish a principle which will tend to diminish the caution of railroad servants, and thus increase the risk of passengers.

The defendants have been in no fault, in this case, either in the construction of their road, the use of defective engines, or the employment of careless or untrusty servants. So that the question

is, whether they are liable to the plaintiff, on an implied contract of indemnity. The contract between the parties to this suit excludes the notion that the defendants are liable for the injury received by the plaintiff. He agreed to run an engine on their road, knowing the state of the road, and also knowing Whitcomb, his character, and the specific duty intrusted to him. The plaintiff therefore assumed the risks of the service which he undertook to perform; and one of those risks was his liability to injury from the carelessness of others who were employed by the defendants in the same service. As a consideration for the increased risk of this service, he received higher wages than when he was employed in a less hazardous business.

The defendants are doubtless bound, by an implied contract, to use all the ordinary precautions for the safety of passengers, and are liable for injuries which a passenger may receive in consequence of the negligence of their servants. But the plaintiff was not a passenger, and his counsel does not place his claim on that ground.

The only cases in which a servant has attempted to recover of a master for another servant's misconduct are *Priestly v. Fowler*, 3 Mees. & Welsb. 1, and *Murray v. South Carolina Railroad Company*, 1 McMullan, 385; and in both those cases, it was held that the action could not be maintained. In those cases, it is true that both servants were on the same carriage when the accident happened by which one of them was injured. And the counsel for the present plaintiff has invented a rule of law, in order to escape from the pressure of those decisions. But admitting the distinction, and the rule which he advances, to be sound, the case at bar is not thereby affected. The plaintiff and Whitcomb were not engaged in distinct and separate employments, but in the same service. They both were acting to the same end, although they had different parts to perform.

It will not be necessary for the court to lay down a general rule, in order to decide this case for the defendants. Ordinary care is all that a master is bound to use in behalf of his servants; and the defendants have used such care. They used due diligence in selecting Whitcomb, who was careful and trustworthy. The case is analogous to that of a ship-owner, who is insured, and who has employed a competent master and crew. Though his ship is lost by the negligence of some of the crew, yet he does not thereby suffer the loss of his insurance. *Walker v. Maitland*, 5 Barn. & Ald. 174.

LORING, in reply. In the case in 1 McMullan, 385, the plaintiff, as in the case in 3 Mees. & Welsb. 1, was jointly engaged in the same service with the other servant, whose negligence caused the injury. It therefore does not affect the principle on which the present plaintiff rests his cause.

SHAW, C. J.: This is an action of new impression in our courts, and involves a principle of great importance. It presents a case, where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to

perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com. 431. *M'Manus v. Crickett*, 1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.¹

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded, that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent or unskillful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master

¹"This is right in substance but a modern jurist would probably prefer to say that the relation was one wherein the duties and liabilities of both parties were fixed by law." Hon. John F. Dillon, 24 Am. Law Rev., p. 180.

to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law—like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy—or that of an innkeeper, to be responsible, in like manner, for the baggage of his guests; it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. *Priestley v. Fowler*, 3 Mees. & Welsb. 1. *Murray v. South Carolina Railroad Company*, 1 McMullan, 385.

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly.² And we

²While the great majority of cases agree in resting the master's exemption from liability upon an implied term in the contract between him and his servant whereby the latter assumes the risk of injury from the misconduct of his fellow service, considerable difference of opinion is exhibited as to the reasons requiring such a term to be implied. The servant's knowledge that "he was exposed to the risk of injury from a want of [skill and care] on the part of a fellow servant" (*Alderson, B., Hutchinson v. Ry.*, 5 Exch. 343 [1850], p. 351), either alone or in conjunction with his knowledge that "against such want of care his employer cannot by any possibility protect him" (*Lord Cranworth, Bartonshill Co. v. Reid*, 3 Macq. 266 [1868], p. 284), it is often said, "makes it reasonable to presume that each servant agrees, to run the risk of that which he knows to be in the nature of things inevitable" (*Beasley, C. J., Paulmier v. R. R.*, 34 N. J. L. 151 [1870], p. 155). In other cases these risks are said to have been considered in the adjustment of the servant's wages. *Blackburn, J., Morgan v. Vale of Neath Ry. Co.*, 5 B. & S. 504 (1864), p. 579; so *Doe, J.*, says, "the servant has agreed to bear and is paid for bearing the risks incident to the service; the stranger has not made such an agreement and is not paid for bearing such risks;" *Fifield v. R. R.*, 42 N. H. 225 (1860), p. 235; similar expressions are used in *Coon v. R. R.*, 6 Barb. (N. Y.) 231, (1849), p. 243; *Russell v. R. R.*, 17 N. Y. 135 (1858), p. 137, per *Selden, J.*; *Sullivan v. R. R.*, 11 Iowa, 421 (1860), p. 423; *Mobile, etc., R. R. v. Smith*, 59 Ala. 245 (1877), p. 252, and in *Chicago, etc., R. R. v. Harney*, 28 Ind. 28 (1807). *Frazer, J.*, says, p. 30: "The ordinary risks of the service are usually, in fact, considered in making the employment and adjusting the wages, and this may with great propriety be held to be always so in legal contemplation," but see *Pollock, C. B., Abraham v. Reynolds*, 5 H. & N. 143 (1860), says, p. 147: "The test is not whether the party complaining is paid to undertake the risk. A guest is in the same position as a servant because he has the means of judging of the character of the house in which he is"; but see *Bramwell, B., Degg v. Midland Ry. Co.*, 1 H. & N. 773 (1857), p. 780, who holds that while "the consideration may not be as obvious, it is as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself from the negligence of fellow workmen, as it would be if paid for his services."

Nor has the doctrine that the servant's inability to recover from his master for injuries received by a fellow servant's negligence, itself, escaped

are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskillfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. *Copeland v. New England Marine Ins. Co.*, 2 Met. 440-443, and

severe and searching judicial criticism. "However plausible may be the theory," says McCurdy, J., in *Burke v. R. R.*, 34 Conn. 474 (1867), p. 479, "it is very doubtful whether in fact a spinner in a factory or a fireman on a railroad ever made an examination into the condition of the machinery, the mode of conducting the business, or the character and habits of the operatives, for the purpose of ascertaining the extent of his risk as an element in calculating the proper amount of his wages. A passenger in a railroad car may well be presumed to have a vivid consciousness of his risk, but it has never been understood that he contracts with reference to it when he buys his ticket so as to be his own insurer." Lord Benholm says in *Gregory v. Hill*, 8 MacPherson 282 (1869), p. 287, "Can anything be more artificial? I should say that you might just as well presume that implied contract" (that no damages should be claimed for injuries through the fault of a servant) "in the case of a contractor as in the case of a fellow servant, strictly so called." Gaines, J., in *St. Louis etc., R. R. v. Welch*, 72 Tex. 208 (1888), considers the doctrine untenable, "It amounts to saying that the law is that he cannot recover because he takes the risk, and that he takes it because the law is so. By a parity of reasoning we might assume that he takes the risk of his master's personal negligence," and hold the basis to be public policy, "founded on the theory that it is calculated to make servants in a common employment watchful of each other, and, therefore, to promote carefulness in the performance of their duties. So Earl, J., *diss.* in *Crispin v. Babbitt*, 81 N. Y. 516, says, p. 529, that it was supposed "that it would cast upon the master too much responsibility to hold him liable for injuries against which he could by no possibility guard, sustained by one servant from the negligence of a co-servant, and that the servants would be better protected if they were forced to rely on their own care and vigilance than on those of the master. Hence to enforce the supposed public policy a fiction has been invented by which the servant is said to assume all the risks of the service, which includes the risk of injuries caused by the negligence of co-servants." "If this fiction were literally applied," "then the master would not be liable to such servant for his own negligence, as that would be as much an incident to the service as the negligence of a co-servant." And see extract from letter of Lord Cairns to the *London Times*, quoted in McFall's pamphlet on Employers' Liability, p. 107. "There cannot continue to be an implied term in contracts where one of the parties distinctly repudiates the existence of any such term. That is now the position of the workmen," and see *Labatt—Master and Servant*, §474, n. 6.

cases there cited. I am aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point, that persons are not to be responsible, in all cases, for the negligence of those employed by them.³

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote⁴ the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited; a common carrier, without regard to to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is, therefore, thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers,

³As to the use of insurance cases as precedents in actions of tort, see *Lynn Gas and Electric Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570 (1893), p. 576.

⁴See 20 Harv. L. Rev., 31, n. 1.

Many courts doubt the policy of releasing the master from all liability to one servant for the consequences of the negligence of a fellow servant, and so removing the strong incentive of the fear of financial loss, which would move the master not only to require of his employes that they should be considerate of the safety of their fellows, as well as efficient in serving their employer's interests, but also to see to it that they were considerate as well as efficient. "It is by no means certain," says McCurdy, J., in *Burke v. R. R.* *supra* n. 1, "that the public interest would not be best subserved by holding the superior, with his higher intelligence, his surer means of information, and his power of selecting, directing and discharging subordinates, to the strictest accountability for their misconduct in his service, whoever may be the sufferer from it," and see also extract from judicial opinions and text writers collected in Notes 1 to 5, §474, *Labatt on Master and Servant*. Contrast the conception of public policy which hold void express contracts by passengers and shippers assuming the risk of the negligence of the servants of their carriers, because to regard them as valid would remove the incentive to care necessary for the protection of the lives and property carried, *Quinby v. R. R.*, 150 Mass. 365 (1890), with that which holds that a servant by the mere act of entering his master's service must be taken to have impliedly assumed this very risk, and see 20 Harv. L. R., 23-24 and notes.

and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, §590, *et seq.*

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer. See *Winterbottom v. Wright*, 10 Mees. & Welsb. 109. *Milligan v. Wedge*, 12 Adolph. & Ellis, 737.

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from

the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and if so, it must be on the ground, that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract; and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from

that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears, that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam engine: Whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company—are questions on which we give no opinion. In the present case, the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained.

Plaintiff nonsuit.⁵

⁵ *Accord*:—*Hutchinson v. York, etc., Ry. Co.*, 5 Exch. 343 (1850); *Randall v. R. R.*, 109 U. S. 478 (1883); *Coon v. R. R.*, 6 Barb. (N. Y.) 231 (1849),

LOWRIE, J., in *Ryan v. Cumberland Valley Railroad Co.*, 23 Pa. 384 (1854), p. 386: The rule announced by these cases is, that where several persons are employed in the same general service, and one is injured from the carelessness of another, the employer is not responsible.

On what principle can a contrary rule be founded? The maxim, *sic utere tuo ut alienum non laedas*, does not apply; for that is the most general of all rules, intended to define the duties of those who have no other relation than contiguity and a common humanity. It is intended as the general rule, defining the general relation of man in society, and not any of the special relations, which must have their own rules, depending upon their special character. Our question is, therefore, reduced to this: What is there in the special relation of master and servant from which a contrary rule can be deduced?

With us this relation is always instituted by a contract, and to that we must look for the principal terms by which it is defined. The contract defines the duty of each party; and as we do not find that the duty which is now insisted on was made a part of the contract, we infer that it has no existence.

But it must be conceded that many of the relations of life are instituted in the most general terms, and that the special duties of each party are so well understood in society that they are left entirely undefined in the contract, and each is presumed to have undertaken them without their being formally specified. Certainly no one will pretend that the duty here insisted upon has, in this way, become part of this contract; for no one so understands it, and no one would so contract if requested.

There is, therefore, no way left but to allege that the law has made it a duty of a master to see that his servants do not injure each other by their carelessness. There is no statute of this purport; and therefore the allegation must be that it is a part of the common law. But the common law consists of the general customs of the people, and of the maxims and principles on which they act; and it is conclusive against the rule contended for that it has never been found among these, and is not deducible from them.

But the duty insisted upon is substantially one of protection, which cannot exist without implying the correlative one of dependence or subjection.

affd. 5 N. Y. 492 (1851); *Harrison v. Central R. R.*, 31 N. J. L. 293 (1865); and see also cases cited, *accord*, from the great majority of American jurisdictions in Note 14. *Sherman and Redfield on Negligence*, 5th Ed., § 180.

The Roman law recognized no distinction between a servant and a stranger in respect to a master's liability for the misconduct of other servants employed by him. His liability to either, save in certain exceptional cases, existed only when he was personally at fault in selecting (*elegendo*) or supervising (*custodiendo*) the delinquent servant. See A. Pearse Higgins, Esq., 9 Judicial Rev., p. 256, *et seq.* So in those countries, whose jurisprudence is founded in whole or in part upon the Roman law, and which have not fallen under the dominance or influence of a common law jurisdiction, the master's liability—whether the restricted liability of the Roman law or a general liability to answer for all the injurious consequences of the acts of those employed in his affairs (as in France, under Act 1384 of the *Code Civile*), or special liabilities of this latter nature laid in those who operate railways or carry on certain other classes of dangerous business (as in Germany, see 9 *Jur. Rev.*, pp. 260, *et seq.*); to a servant is precisely the same, neither less nor more, than that to a patron or stranger.

France. Dalloz, 1841, *Partie 1*, 271—it is said by H. D. Bateson, Esq., 5. L. Q. Rev., p. 184, that the law of *Italy and Switzerland* follows that of France, as does that of *Quebec*, *Asbestos Co. v. Durand*, 30 Can. S. C. 285 (1900); *Queen v. Grenier*, *ibid* 12; *R. R. v. McDuffey*, 79 Fed. 934 (1895); *Mexico Cent. R. R. v. Sprague*, 114 Fed. 544 (1902); *Germany and Austria*, see 9 *Judicial Rev.*, pp. 249, 395.

The common law doctrine of fellow service was in Scotland, "not so much adopted from England as thrust upon the Scottish courts by decisions of the House of Lords," Pollock *Essays on Jurisprudence*, p. 115; *Dixon v. Rankin*, 14 Dunlop 420 (1852), and *Bartonshill Co. v. Maguire*, 3 Macq. 266 (1858), and was in Louisiana adopted from the neighboring common law jurisdictions, see *Towns v. R. R.*, 37 La. Amt. 630 (1885).

The relations of husband and wife, parent and child, are in law relations of protection and dependence; and there are those which are so in fact, as where a weak-minded person submits himself to the direction of another; and here the law interferes to protect against an undue exercise of influence and power.

There is no relation of protection and dependence between master and servant, or of confidence in the institution of the relation: we speak not of master and apprentice. The servant is no Roman client or feudal vassal, with a lord to protect him. Both are equal before the law, and considered equally competent to take care of themselves, and very often the servant is the more intelligent of the two.

The argument that the law implies a warranty that one servant shall not be injured by the carelessness of another, is only another way of stating the proposition that the law imposes the duty of protection and it must be set aside by the same answer.

And what would be the value of such a rule? If it exists at all, it must grow out of the relation and affect all persons standing in it; and this would change all our ideas concerning the relation of master and servant. Every man must have his own business, whether as master or as servant, and there is no business without its risks. Where many servants are employed in the same business, the liability to injury from the carelessness of their fellows is but an ordinary risk, against which the law furnishes no protection but by an action against the actual wrongdoer. It would violate a law of nature if it should provide an immunity to any one against the ordinary dangers of his business, and it would be treating him as incapable of taking care of himself.

If we declare that workmen are warranted against such carelessness, then the law places all careless men, which means all badly educated or badly trained men, and it places even those who have not acquired a reputation for care, under the ban of at least a partial exclusion from all work. And this is the ordinary result of all undue attempts to protect by law one class of citizens against another. It is done at a practical sacrifice of liberty on the part of those intended to be protected, and to the embarrassment of the common business of life, by imposing upon the people a rule of a new and unusual character which may require half a century to become fitted like a custom, and adapted to the customs already existing which it does not have the effect of annulling.

POLLOCK, C. B., in *Abraham v. Reynolds*, 5 H. & N. 143, p. 147:

The case of master and servant is only one of a class. The question has hitherto arisen in cases between master and servant, but it appears to me that the learning on the subject has not been exhausted. When two persons serve the same master, one cannot sue the master for the negligence of his fellow servant. The rule applies to every establishment. No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect to which, if he had been a stranger, he might have had a right of action. A friend of the servant, a son, a relation, living in the same house, not in the character of a servant, but as a member of the same family, are probably in the same position, and such persons cannot maintain actions any more than a servant could. But that is where they form one family, in one establishment, for one common purpose.¹

¹ So he says, p. 147: "A guest is in the same position as a servant." So Bramwell, L. J., *Swainson v. Ry.*, L. R. 3 Ex. Div. 341 (1878), p. 348, says that, the rule that a person injured by the negligence of a fellow servant cannot maintain an action against the master "extends to guests who cannot sue the master of the house for an injury done by his servant."

EASON v. S. & E. T. RAILWAY CO.

Supreme Court of Texas, 1886. 65 Texas, 577.

WILLIE, Chief Justice: The demurrer to the petition was sustained, it seems, on the ground that the appellant, in performing the duty of a brakeman at the time he was injured, assumed all the risks incident to the position, and, hence, could not recover for an injury caused by the negligence of a fellow servant. This is the law when the injured party is a mere volunteer in the performance of the service. For instance, where one having no interest in the loading or unloading of a car, or in the carriage or delivery of passengers or freight, volunteers to assist in reference to such matters, and, whilst thus engaged, is injured, he stands in the same position as a regular employe engaged in the particular service, so far as any right of recovery for his injuries is concerned. *Mayton v. T. & P. Ry. Co.*, 63 Tex. 77; *New Orleans, &c., Ry. Co. v. Harrison*, 48 Miss. 112; *Flower v. Penn. Ry. Co.*, 69 Penn. St. 210.¹

But the case is different when the injured party was acting at the time in furtherance of his own or his master's business. 2 *Thompson on Neg.*, 1045.

Thus, when the owner of freight transported by a railway company was allowed to assist in its delivery, and, in so doing, was injured through the carelessness of the company's servant, it was held that he could recover damages of the company. *Holmes v. N. E. Ry. Co.*, L. R. 4 Exch. 254; *Wright v. London, &c., Ry. Co.*, 1 Q. B. Div. 252.

So, when a passenger on a street car voluntarily assisted the driver in backing the car upon a switch, so that another car coming in an opposite direction could pass, and was injured through the negligence of the driver of the latter car, he was allowed to recover damages of the street car company. *McIntyre Ry. Co. v. Bolton*, 21 A. and E. R. Cases, 501.²

The principle upon which a recovery is allowed is this: The injured person is not a volunteer, but engaged at the request or with the permission of the railway's agents in a transaction of interest as well to himself or his master as to the railroad company, and this entitles him to the same protection against the negligence of the company's servants as if he were at the

¹ *Accord: Degg v. Midland Ry.*, 1 H. & N. 773 (1857), "It seems impossible to suppose that the deceased, by volunteering his services, can have any greater rights or impose any greater duty on the defendants than would have existed had he been a hired servant." *Bramwell, B.*, p. 789; *Potter v. Faulkner*, 1 B. & S. 800 (1861); *Wischam v. Rickards*, 136 Pa. 109 (1890); *Artz v. Lit.*, 198 Pa. 519 (1901); *Barstow v. R. R.*, 143 Mass. 535 (1887); *Johnson v. Ashland Water Co.*, 71 Wis. 553 (1888), per Taylor, J., p. 556; and this applies to a servant who at the request of another servant assists such other in work which he himself is not employed to perform. *Osborn v. Knox & Lincoln*, 68 Me. 49 (1877), master of a ferry boat assisting, at conductor's request, a train crew in uncoupling cars.

² 43 Ohio St. 224 (1885), decided on the ground that the passenger "was interested in having the car driven to its destination."

time attending to his own private affairs. Though, performing a service beneficial to both, he is doing so in his own behalf, and not as a servant of the company. Their request or acquiescence gives him the right to perform the service; the fact that he acts in his own behalf, however beneficial his labor may be to the company, gives him the right to be protected against the negligence of the company's servants. The act done by him should be a prudent and reasonable one, and "not a wrongful intermeddling with business in which he had no concern." *McIntyre v. Bolton, supra*.

Does the appellant's position bring his case within this principle? He was not an employe of the railway company, but of the owners of the mill who shipped lumber by the company's cars. His business was to load lumber upon the cars for his employers. The car which he attempted to couple to the train was placed in the situation it occupied for the purpose of being loaded with lumber by the servants of Carlisle & Snelling, who owned the mill. It was so located that it could not be conveniently loaded, and to have it hauled upon the track was a matter of interest to the plaintiff's employers.

This fact was called to the attention of the conductor by the appellant himself, acting in behalf of his employers, Carlisle & Snelling. The conductor consented to his request, but, being short of brakemen, asked the appellant to couple the car to the one immediately in front of it, which the latter consented to do; and, in its performance, received the injury complained of, through the negligence of the engineer. The service the appellant was performing at the time was in furtherance of the master's interest in having the car placed where it could be loaded more conveniently, and hence, expedited in starting for the destination of the lumber. He was still acting in the capacity of a servant for Carlisle & Snelling; was doing so at the request, and, of course, with the permission of the defendant company. The act he was performing was not only a prudent and reasonable one, but absolutely demanded by the circumstances. The coupling was necessary to the removal of the car to a proper position, and the company had not sufficient brakemen to perform the duty at the time. It is difficult to see how a case could be brought more completely within the principles we have announced. It is a stronger case in behalf of the injured party than any of those we have cited; and the plaintiff was as much entitled to recover, if the allegations of his petition were borne out by the facts, as if he had been injured by the negligence of the engineer when loading the car with lumber for his employers.

We think the court erred in sustaining the demurrer to the petition, and for this error the judgment must be reversed and the cause remanded.

Reversed and remanded.*

* *Accord: Abraham v. Reynolds*, 5 H. & N. 143 (1860), with which compare *Potter v. Faulkner, supra*, n. 1; *Louisville, etc., R. R. v. Ward*, 98 Tenn.

BAIRD v. PETTIT.

Supreme Court of Pennsylvania, 1872. 70 Pa. 477.

WILLIAMS, J.: The plaintiff below was employed as draftsman in the works carried on by the defendant for the manufacture of locomotive engines. On the evening of the 15th of November, 1865, after the hands had quit work, he left the building where he was employed, and was on his way home, when he fell over a pile of dirt and rubbish on the sidewalk in front of the premises, a few feet from the steps of the building, which had been thrown out in deepening a cellar, and left on the pavement, and in falling received the injury for which this action was brought. The work of excavating the cellar was done under the superintendence of the carpenter employed to do the jobbing work about the premises, but the men who did the excavation, as the jury have found, were subject to the defendant's direction and control.

But there is another reason¹ for holding that the rule which exempts a master from liability for an injury occasioned by the negligence of a servant does not apply in this case. The

123 (1897); *Welch v. Me. Cent. R. R.*, 87 Me. 552 (1894), plaintiff injured while assisting the crew of a gravel train, at their request, to unload gravel which the defendant was delivering to his employer; and compare *Wischam v. Rickards*, 136 Pa. 109 (1890), in which, upon facts substantially similar to those in the principal case, it was held that, "the plaintiff's participation was not that an owner receiving his own goods, but was that of a servant assisting the servants of the defendants," per Green, J., p. 128; *Standard Oil Co. v. Anderson*, 212 U. S. 215 (1909).

So, where one railroad has the right to use the tracks and yards of another, the servants of the two companies, engaged in furthering the business of their respective employers, are not fellow servants, *Northern Pacific R. R. v. Craft*, 69 Fed. 125 (1895); *Cleveland, etc., R. R. v. Kernochan*, 55 Ohio St. 306 (1896); car inspectors employed by one company, injured by negligent operation of trains by employees of another company having right to use same tracks; *P. W. & B. R. R. v. State*, to use of Bilger, 58 Md. 372 (1882); *Swanson v. Ry. Co.*, L. R. 3 Ex. Div. 341 (1878); and this is so, although both companies must run their trains according to the rules and subject to the special orders of the company owning the track. *Phillips v. R. R.*, 64 Wis. 475 (1885), or where one company contracts to run one train daily over the line owned by another company, *Ziegler v. R. R.*, 52 Conn. 543 (1885). In consequence of a similar decision in the case of *Catawissa R. R. v. Armstrong*, 40 Pa. 186 (1868), an act of legislature was passed April 4, 1868, P. L. 1868, 58, §1, providing that those killed or injured while "lawfully engaged or employed on or about the rails, works, depots or premises of a railroad company or in or about any train or car therein or thereon" and not employees of such company, shall have only such right of action as would have existed had they been employees of such company. This act was repealed June 10, 1907, P. L. 1907, p. 522. The decisions under it will be found collected in P. & L. Dig. of Decisions, Vol. 13, p. 21,998; the most important being *Spesak v. R. R.*, 152 Pa. 281 (1893), and *Vannatta v. R. R.*, 154 Pa. 262 (1893).

¹ A part of the opinion is omitted, holding that the plaintiff did not assume the risk of the negligence of the carpenters who were engaged in deepening the cellars, since he had no reason to anticipate that accepting the position of draughtsman would probably expose him to the risk of injury from the negligence of such workmen, though employed and paid by the same master. See *The Petrel*, *post*, p. 374, and notes.

relation of master and servant did not exist between the parties when the plaintiff received the injury. He was not then in the service of the defendant; he had quit work and was on his way home. He was no longer subject to the defendant's control, or bound to obey his orders. As soon as he left the building he was his own master. He was then no more in the defendant's service than any other citizen passing along the street, and he was entitled to the same rights and immunities. If the relation of master and servant did not cease when he left the building, after his day's work was done, when did it? It cannot be pretended that it followed the plaintiff home and remained with him while there. And if not, it must have ceased when he left the building, and he had the same right to an unobstructed sidewalk in front of the defendant's premises as any other citizen; and, if injured by a dangerous obstruction, the same remedy for an injury. It will scarcely be contended that if, while on his way home, he had been run down by the defendant's carriage, through the carelessness of the driver, the defendant would not have been responsible for the injury, because the negligence of the driver was one of the risks which the plaintiff assumed when he entered into his service. But in principle what difference is there between the two cases? Why is not the driver of defendant's carriage as much the plaintiff's fellow servant as the digger of the cellar? And why should the plaintiff be required to foresee and take into account the risk arising from the negligence of the one and not of the other? There is no real difference between the cases, and neither case is within the rule which exempts masters from liability for injuries occasioned by the negligence of their servants. It is clear that this case is not within the rule, not only for the reason that the injury did not happen to the plaintiff while he was engaged in the defendant's service, but because it was not occasioned by any of the risks he assumed when he entered into his employment. The risk which occasioned the injury was not one incident to the business, and to which only the workmen engaged in carrying it on were exposed; but one unconnected with the business, and to which all citizens having occasion to pass along the street were as much exposed as the plaintiff and his fellow-workmen.

It follows from what we have said that there was no error in the instructions given by the learned judge of the District Court to the jury, or in his refusal to affirm the points submitted by the defendant.²

Judgment affirmed.³

²The court had in effect charged that if the persons engaged in making the excavations were not independent contractors, but were doing the work under the control of the defendants and as their servants, the defendants were as much liable for their negligence to one of their own servants as to anyone else, and had refused to charge that though engaged in different departments of the defendants' business, the negligent workman, if working under the defendants' superintendence and control, and the plaintiff were fellow servants.

³Accord: *Savannah, etc., R. R. v. Flanagan*, 82 Ga. 579 (1889); *Fletcher*

v. R. R., 168 U. S. 135 (1897), railroad employees injured by careless operation of their employer's trains upon tracks adjacent to or upon highways on which they were walking home.

Whether an employee while upon his master's premises, but not actually at work for him, is or is not to be regarded as in the master's service depends upon whether that part of the premises, on which he is, is or is not a part over which he must pass to reach the point where his actual work is to be done. *Ewalt v. R. R.*, 70 Wis. 420 (1880); *Gane v. Norton Hill Colliery Co.*, L. R. 1909, 2 K. B. 539 (employee's injury held an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 8 Edw. 7, § 58, 1906), both cases where workmen were injured in crossing their employer's tracks on their way to or from their work; *Kappe v. Brown Shoe Co.*, 116 Mo. App. 154 (1905), servant chose to ride to workroom in freight elevator in preference to walking up the stairs; but see *Northwest Packet Co. v. McCue*, 17 Wall. 508 (1873), and compare *Baltimore, etc., R. R. v. State*, to use of Trainor, 33 Md. 579 (1870), and *Sullivan v. R. R.*, 73 Conn. 203 (1900), where the servant, injured while using his employer's right of way as a highway after quitting his place of work, was held no longer in the latter's service.

A mere temporary cessation of labor, such as a dinner hour, does not, if spent on the premises, interrupt the service, *Boyle v. Columbian Mills Co.*, 182 Mass. 93 (1902); but see *Orman v. Salvo*, 117 Fed. 233 (C. C. A., 8th Circ., 1902), where it was held that an employee who was engaged to do construction work in a desolate country which required him to keep in quarters provided by the master adjacent to his place of work, was not in the master's service while asleep in such quarters; but compare with this *Shoemaker v. R. R.*, 46 Minn. 39 (1891).

Whether a railroad employee is considered to be as in the company's service while riding in its trains to or from the place where his actual work for it is to be performed depends on the facts of the particular case. If the journey is one which the nature of his employment or his contract with the company requires him to make, he is regarded as being, during it, in its service; as where he is employed as one of the crew of a construction, repair or wrecking train.—*Gillshannon v. R. R.*, 10 Cush. (Mass.) 228 (1858); *Tunney v. Ry. Co.*, L. R. 1 C. P. 289 (1866); *Cremins v. Guest, et al.*, L. R. 1908, 1 K. B. 469; *St. Louis, etc., R. R. v. Harmon*, 85 Ark. 503 (1908)—or where the servant has no fixed place of work, being employed to travel at the company's orders to any point where his services may be required—*Louisville, etc., R. R. v. Stuber*, 108 Fed. 934 (C. C. A. 6th, 1901), employee in charge of water supply; *Travellers' Ins. Co. v. Austin*, 116 Ga. 264 (1906), paymaster going from point to point to pay the company's employees; *Shannon v. R. R.*, 27 R. I. 475 (1906), switch cleaner; *St. Clair v. R. R.*, 122 Mo. App. 519 (1906); *Manville v. R. R.*, 11 Ohio St. 417 (1860); *contra, Harris v. Traction Co.*, 100 Pac. 938 (Wash., March 27, 1909), foreman in charge of repair work traveling to a place where his work called him upon a pass entitling him and his gang to transportation—or where a special train is provided to take the workmen to their place of labor, upon which they are required by their contract to travel. *Vick v. R. R.*, 95 N. Y. 267 (1884); *Killduff v. R. R.*, 195 Mass. 307 (1907).

But if the servant as part of his compensation receives the right to free transportation available either for any purpose [*Doyle v. R. R.*, 162 Mass. 66 (1894); *Dickinson v. Ry.*, 177 Mass. 365 (1901), a general right of free transportation to all employees wherever bound; *Enos v. Ry.*, 28 R. I. 291 (1908), a limited number of free tickets], or only for carriage to and from work [*McNulty v. R. R.*, 182 Pa. 479 (1897)] the servant is regarded as a passenger. So, too, it is generally held that a servant to whom without any prior agreement free transportation to or from work is, generally or on some particular occasion, given as a favor and not as of right is carried as a gratuitous passenger and not as a servant. *Birmingham, etc., Co. v. Sawyer*, 19 L. R. A. N. S. 717 (Ala., 1909), and see cases cited in note thereto. *Goehring v. Traction Co.*, 222 Pa. 600 (1909); *Chattanooga R. R. v. Venable*, 105 Tenn. 460 (1900); *Whitney v. R. R.*, 102 Fed. (C. C. A. 1st Cir., 1900) 850; *Peterson v. Traction Co.*, 23 Wash. 615 (1900); *Louisville, etc., R. R. v. Weaver*, 22 Ky. L. R. 30 (1900); *contra, Ionnone v. R. R.*, 21 R. I. 452 (1899); *Russell v. R. R.*, 17 N. Y. 134 (1858); *semble*.

JOHNSON v. LINDSAY & CO.

In the House of Lords, 1891. L. R. 1891. Appeal Cases, 371.

Messrs. Higgs & Hill, the appellant's employers, were contractors for the construction of a block of buildings in accordance with plans and specifications prepared by the owner's architect, which required that concrete floors for laundry purposes, on the Lindsay system, should be put in. The details of these floors were entered in the specifications under the heading, "Power for other tradesmen to perform works," and there was a provision that in order to carry out such works, the contractors were to allow free access to the premises, etc., to such tradesmen. The contractors were also to provide £215 to be paid to Lindsay & Co., or any other firm approved by the architect, for such floors, and were to allow Lindsay & Co. the use of their scaffolding and to give any necessary assistance and were to work with them as might be necessary for the due dispatch of their work. Arrangements had been practically completed between the architect and Lindsay & Co. before the contract with Higgs & Hill was entered into. The respondents had no contract with Higgs & Hill; and they came under no obligation either to receive directions from that firm, or in any way to submit to their control. The evidence does not show or even suggest that, in point of fact, Higgs & Hill ever attempted to interfere with the respondents' work, or to assume control over their servants who were employed in its execution.

It is not disputed that the appellant was engaged and paid by Higgs & Hill, or that the workmen through whose fault he was injured were engaged by, and received their wages from, the respondents. At the time when he was injured, the appellant was clearing away rubbish from the lower story of the building, in the course of his duty, as the servant of Higgs & Hill, who had undertaken to perform that operation. The respondents' servants were raising buckets of concrete to the topmost story, for the purposes of their contract with Mr. Burden, by means of a pulley and tackle, supplied by Higgs & Hill, as required by the specification, when, through want of due care on the part of the respondents' servants, a bucket fell upon and injured the appellant.

At the trial before Grantham, J., the jury found a verdict for the plaintiff for £52 10s., and judgment was entered accordingly. The Queen's Bench Division (Pollock, B., and Manisty, J.) ordered the verdict and judgment to be set aside and judgment to be entered for the defendants on the ground that the plaintiff at the time of the accident was engaged in a common employment with the servant of the defendants whose negligence caused the injury to the plaintiff, and that the defendants therefore could not be held liable. This judgment was affirmed by the Court of Appeals (Cotton and Lopes, L. JJ., Fry, L. J., dissenting [23 Q. B. D., 508]).

LORD HERSHELL (after stating in substance the facts given above, proceeded thus):—

The only other facts necessary to be stated are that there were, as far as appears, no communication between Higgs & Hill and Lindsay & Co. before the latter commenced their work, and that it was the architect who advised them that the buildings were sufficiently advanced to enable them to commence the work for which they had given him an estimate. It should be added that the payments were made to Lindsay & Co. through Higgs & Hill, and that at the time when the accident happened the appellant was not engaged about the work included in Lindsay & Co.'s contract.

Upon this state of facts it is, I think, clear that the appellant was in no sense the servant of Lindsay & Co. It follows, therefore, that if it is essential to the defense of common employment that the person suing should himself be the servant of the master by whose servant's negligence the injury has been caused, the defense cannot be sustained in the present case. And upon a review of the authorities, I am unable to entertain any doubt that this is essential. Lord Cranworth, in delivering his opinion in this House, in the case of the *Bartonshill Coal Company v. Reid* (3 Macq. 266, 295), thus states the rule established in this country: "When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks." The law is laid down in substantially the same terms by Lord Blackburn in *Howells v. Llandore Steel Company* (L. R. 10 Q. B. 62), and by Lord Chief Justice Erle in *Hall v. Johnson* (3 H. & C. at p. 595), who, in delivering the judgment of the Exchequer Chamber, said: "The case falls within the principle established, not only in this country, but also in Scotland, Ireland, and America, that a servant when he engages to serve a master undertakes as between himself and his master to run all the ordinary risks of the service, including negligence on the part of a fellow-servant, when he is acting in the discharge of his duty as a servant of him who is the common master of both." And in the recent case of *Swainson v. North Eastern Railway Company* (3 Ex. D. pp. 348, 349), Lord Bramwell said: "We must consider what obligations a servant takes upon himself; it is sometimes said that he contracts to take upon himself the risks of his service; but the proposition may also be stated as follows, namely, that he has not stipulated for a right of action against his master if he sustains damage from the negligence of a fellow-servant. The two forms of the proposition seem to me substantially the same; in either case it is necessary to prove that a relation has been established between the person who complains and the master of the person who does the injury." The present Master of the Rolls in the same case thus expressed himself: "I think that the authorities bear out the proposition laid down in the Exchequer Division, that in order to give rise to the exemption there must be a common

employment and a common master. It is not necessary that there should be a common service for a definite time or at fixed wages, for the exemption exists in the case of volunteers and of other persons, where plainly there has been no contract for payment; a volunteer puts himself under the control of another person, and in respect of that other person he is for the time being in the position of a servant."

These authorities are sufficient to establish the proposition that unless the person sought to be rendered liable for the negligence of his servant can show that the person so seeking to make him liable was himself in his service, the defense of common employment is not open to him. Such service need not, of course, be permanent or for any defined term. The general servant of A may for a time or on a particular occasion be the servant of B, and a person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such.¹ This, as has been pointed out, is the position of a volunteer. But it is obvious that if the exemption results, as it does according to the authorities I have cited, from the injured person having undertaken, as between himself and the person he sues, to bear the risks of his fellow-servant's negligence, it can never be applicable when there is no relation between the parties from which such an undertaking can be implied. There are other considerations which point in the same direction. It must be remembered that whilst a servant contracts with his master to bear the risks of the negligence of his fellow-servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take due care to select competent servants. And it would be most unreasonable to hold that he is exempt from liability for his servants' negligence in any case where he is not under this obligation. But I do not see how such an obligation can arise otherwise than from some contractual relation. The obligation and the exemption appear to me to be correlative and to be implied from the relation of master and servant created between the parties.

In the first place, I do not think that Lindsay & Co. were sub-contractors under Higgs & Hill; I think they had an independent contract with those who were employing Higgs &

¹ "When one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he was lent, although he remains the general servant of him who lends him." Pollock, C. B., *Kourke v. White Moss Colliery Co.*, L. R. 2 C. P. 205 (1877), p. 209.

Accord: *Johnson v. Boston*, 118 Mass. 144 (1875); *Hasty v. Sears*, 157 Mass. 123 (1892); *Erven v. Lippincott*, 47 N. J. L. 192 (1885); so in *Roe v. Winston*, 86 Minn. 77 (1902), a railroad company having furnished a construction train to the defendants, contractors employed to straighten its line, as required by its contract with them, it was held that the plaintiff, a brakeman on the train, and the engineer, by whose negligence he was injured, are servants of the defendants within the terms of § 816, R. S. 1898, making "persons", etc., "operating" railroads as, *inter alia*, "contractors" liable to an employee injured by the negligence of other employees.

Hill.² In the second place, even if they are to be regarded as in some sense sub-contractors under Higgs & Hill, I think it is impossible to say that the servants of Higgs & Hill were the servants of Lindsay & Co., or that they had put themselves under the control of Lindsay & Co. to act as their servants, or were in any way acting as such at the time of the accident.³

It only remains for me to notice the recent Scotch decision in the case of *Woodhead v. Gartness Mineral Company* (Sc. Sess. Cas. 4th Series, 469), which was naturally much relied on by the respondents. Lord Justice Lopes stated in the court below, I think quite correctly, that this decision carried the principle of common employment much further than was warranted by any of the English authorities. And it appears to me to be a development of the doctrine which is really in antagonism with cases which have been decided in this country. It eliminates altogether the element that the injured man and the man doing the injury must be in the employ of a common master, and treats as unimportant that which I consider to be of the essence of the exemption, that is to say, the mutual undertakings between the employer and employed to be implied from the relationship of master and servant constituted between them.

I think the judgment appealed from ought to be reversed and the judgment entered for the plaintiff restored, and I so move your Lordships.

LORD WATSON: I do not think it necessary to discuss the question under what circumstances the servant of one man ought to be considered the servant of another; I can well conceive that the general servant of A might, by working towards a common end along with the servants of B, and submitting himself to the control and orders of B, become *pro hac vice* B's servant, in such sense as not only to disable him from recovering from B for injuries sustained through the fault of B's proper servants, but to exclude the liability of A for injury occasioned,

² Accord: *Morgan v. Smith*, 159 Mass. 570 (1893).

³ So no fellow service between servants of an independent contractor and the servants of him who employs such contractor, though the work is to be done on the latter's premises and tends to bring the two servants so closely in contact with one another that the safety of each manifestly depends upon the carefulness of the other. *Young v. N. Y. Central R. R.*, 30 Barb. (N. Y.) 229 (1859), servant of contractor engaged to repair a railway bridge injured by the failure of those in charge of a train to give notice of its passing (cf. *Woodley v. Ry. Co.*, L. R. 2 Ex. Div. [1877] 384); *Union Pacific R. R. v. Billeter*, 28 Neb. 422 (1889); *Louisville, etc., R. R. v. Conroy*, 63 Miss. 562 (1886); the plaintiff, in the employ of one who had contracted to do grading for the defendant railroad company who was to furnish a train and engineer, was injured by the latter's negligent driving of the train; *Reagan v. Casey*, 160 Mass. 374 (1894); the plaintiff, employed by the City of Boston to dig a ditch, was injured while so engaged, by the negligence of a teamster in the employment of the defendant who had contracted with the city to haul away the dirt. Nor is the servant of a tenant a fellow servant of those employed by the landlord to operate the machinery which supplied power to the tenants of the building; *Poor v. Sears*, 154 Mass. 539 (1891), p. 550.

by his fault, to B's own workmen. In order to produce that result the circumstances must, in my opinion, be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master, for the purposes of the common employment.⁴ To my mind, there is not, in this case, a tittle of evidence to show that the respondents' workmen agreed to submit or were in point of fact subjected to the control either of Higgs & Co., or of Mr. Burden, the architect. I am, therefore, unable to assent to the assumption upon which the judgment of the Court of Appeals proceeds.

I am also unable to assent to the legal doctrine which found favor with the Divisional Court, and was pressed upon us in the argument for the respondents. I do not agree with Baron Pollock, that the rule which exempts a master from liability to his servant for injuries negligently occasioned by a fellow-servant in the course of their common employment rests upon the absence of an implied contract by the master to recoup such damage. The master's responsibility for his servant's acts has its origin in the maxim, "*Qui facit per alium facit per se*," which has been construed as inferring his liability for what is negligently done by the servant acting within the scope of his employment. The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, and rests upon an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow-servant who has been selected with due care by his master.

I am of opinion, with Lord Justice Fry, that, in order to raise the exemption, there must not only be common employment but a common master; and that the respondents are liable, because, in this case, although there was common employment, there was no common master.

⁴ Accord: *D. L. & W. R. R. v. Hardy*, 59 N. J. L. 35 (1896), p. 38. In *Morgan v. Smith* (*supra*, n. 3) Lathrop, J., says, p. 573: "These reasons" [those given by Shaw, C. J., in *Farwell v. R. R.*] "have no application unless the servant knew that he ceases to be under the control of the master who employs him, and passes under the control of a new master."

Whether the servant has or has not been transferred from the service of his general employer, who pays his wages and to whom alone the servant stands in any true contractual relation, depends upon the facts of the particular case.

The test is whether the servant has, to his knowledge [*Morgan v. Smith*, 159 Mass. 570 (1893), p. 573] and with his consent [*D. L. & W. R. R. v. Hardy*, 59 N. J. Law 35 (1896), p. 38, and Lord Watson in the principal case, p. 373, *post*], been placed under the exclusive direction and control of a third party in the carrying out of such third party's business. "The master is he in whose business he is engaged and who has the right to control and direct his conduct." O'Brien, J., *Wyllie v. Palmer*, 137 N. Y. 254 (1893), p. 257. "This generally depends upon the nature of the contract or arrangement expressed or implied" [from what is customary under like circumstances, see as to *quasi* public service trades *Murray v. Dwight* (1901), 161 N. Y. 301] "between his general master and the third person" (Holmes, J., *Driscoll v. Towle*,

THE PETREL.

In the Probate, Divorce and Admiralty Division, 1893. L. R. 1893, Probate 320.

THE PRESIDENT (SIR FRANCIS H. JEUNE): In this case two questions of a wholly different nature arise.¹

On January 5, 1893, the "Petrel" came into collision with the "Cormorant," and the "Cormorant" was sunk. The owners of both vessels are the General Steam Navigation Company. It is admitted that the collision was caused by the negligence of those navigating the "Petrel," and it is proposed to pay into court the sum for which the owners of the "Petrel" are liable. The first question is, whether the master, officers, and crew of the "Cormorant" can claim against this fund in respect of their effects lost in that vessel. It is said that they cannot, by reason of their common employment with the master, officers, and crew of the "Petrel".

No doubt the captain and crew of the "Cormorant" had a common master with the captain and crew of the "Petrel", but were they in common employment with each other?

181 Mass. 414 [1902], p. 416), as understood and carried out by them (*Union S. S. Co. v. Claridge*, L. R. 1894, A. C. 185), to the servant's knowledge. *Morgan v. Smith*, *supra*. The existence or non-existence of a right in such third person to discharge the servant is not conclusive, *Roe v. Winston*, *supra*; *contra*, *Burton v. R. R.*, 61 Tex. 526 (1884); *Gerlach v. Edelmayer*, 47 N. Y. Superior, 292 (1881), but see *The Slingsley*, 120 Fed. 748 (1903), where it is said where the third person has no power to "remove or differently employ the individual whom A" (the latter's general master) has selected, no other power of control is sufficient to establish the relation *pro hac vice* of master and servant.

There is a difference of opinion as to the nature of the third person's right to control and direct necessary to constitute him master *pro hac vice*. The mere power to designate what particular piece of work is to be done or what result is desired is clearly not enough, *Driscoll v. Towle*, *supra*; but in New Jersey and Massachusetts it seems that the right to control the time and place of work and the conditions under which it is done is sufficient, *Ewen v. Lippincott*, *supra*, machinist, sent to repair machinery in a mill, injured by the carelessness of the engineer in starting the machinery while he was still at work; *Hasty v. Sears*, *supra*; *Delory v. Blodgett*, 185 Mass. 126 (1904); though this is not so where it appears that the general master actually does control the details of the means adopted to accomplish the work, *Reagan v. Casey*, 160 Mass. 374 (1894), or where the retention of such power is implied from the nature of the work to be done, as where one furnishes horses and a driver to be used in another's business, *Delory v. Blodgett*, *supra*; or, perhaps, wherever the servant is entrusted with the use of property belonging to the general master, careful use and custody of which is necessary for its preservation, *idem*, p. 129. On the other hand, it is more generally held that he only is the master who has the power not merely to dictate the time and place at which and the conditions under which the work is to be done, but to control the manner of accomplishing it "in all its details." *Sherman & Redfield on Negligence*, §160, cited and approved in *Wyllie v. Palmer*, *supra*; *Coggins v. R. R.*, 62 Ga. 685 (1879); and see *City of Erie v. Caulkins*, 85 Pa. 243 (1878), per Gordon, J., p. 253. What is decisive is "the power to control the work, not merely as to its character, but as to the particular means used to accomplish it."

¹ That part of the opinion dealing with the second question (which related to amount of tonnage by reference to which the measure of the liability of the *Petrel* was to be determined) is omitted.

It is remarkable that although propositions of law defining common employment and recognizing its limitations have more than once been laid down, and have been illustrated by instances in which common employment has been held to exist, there appears to be no decided case in the English Courts (there are several in the Scotch Courts) in which upon consideration of the tests of it, common employment has been negatived. The general principles of the law of common employment were fully laid down in the first case on the subject, *Priestley v. Fowler* (3 M. & W. 1), in 1837. But I think that the most complete exposition of what constitutes common employment is to be found in the great judgment of Shaw, C. J., of Massachusetts, in *Farwell v. Boston Railroad Corporation* (4 Metcalf, 49, quoted at length in 3 Macq. H. L. C. 316), which, no doubt, materially influenced the House of Lords in the case of *Bartonshill Coal Co. v. Reid* (3 Macq. H. L. C. 266), in which, reversing the decision of the Court of Session, their Lordships held that a miner laboring in a mine was in common employment with the engine-driver by whom the cage was worked. Two phases of Shaw, C. J., indicate his view of the test of common employment. One lays down that he who engages in the employment of another for the performance of specified services "takes upon himself the natural risks and perils incident to the performance of such services," and the other refers to the condition of the safety of each servant depending much on the care and skill with which each other shall perform his appropriate duty. This view was adopted by Blackburn, J., in a judgment affirmed by the Exchequer Chamber (*Morgan v. Vale of Neath Ry. Co.*, 5 B. & S. 570, at p. 580; Law Rep. 1 Q. B. 149), in these words: "I quite agree that it is necessary that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. This includes almost if not every case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages." On this principle, it having been previously decided in *Hutchinson v. York, etc., Ry. Co.* (5 Ex. 343), that the engine-driver of a train and a servant of the company carried in the train were in common employment, it was held that a carpenter repairing a turntable was in common employment with shunters working traffic in connection with it. The view of Shaw, C. J., appears again to have been followed in *Lovell v. Howell* (1 C. P. D. 161), in which the principle approved was that the servant accepts the ordinary risk incident to his service. The principle of safety being dependent "in the ordinary and natural course of things" on the skill and care of the fellow-servant, and of "risk of injury being a natural and necessary consequence" of his want of skill or care, is consistent with, though perhaps more

exact than, the test suggested by Lord Chelmsford in the case of the *Bartonskill Coal Co. v. McGuire* from the negative point of view, that common employment does not exist when injury happens to the servant "on occasions foreign to his employment," or to servants engaged "in different departments of duty."²

It was suggested in argument before me with reference to the case of *Charles v. Taylor* (3 C. P. D. 492), that the physical contiguity of the employments constitute a test. But, as Shaw, C. J., points out, this does not afford a distinction on which a practical rule can be established. In all cases the immediate instrument of physical injury must be contiguous to the person injured, and in most cases the person who causes physical injury is not far from the person to whom it results. But I suppose that the signalman at one end of a rifle-range is clearly in common employment with the marker at the other, when the two have a common master; and, to give a stronger instance, a servant who unskillfully packs dynamite in a factory, and another who, in unpacking it at a distant warehouse, is injured by its explosion, are clearly in common employment. On the other hand, mere contiguity, if unusual or accidental, would not be consistent with common employment.

I doubt, also, if "one common object"—the phrase emphasized by Bramwell, B., in *Waller v. South Eastern Ry. Co.* (2 H. & C. 102, at p. 112)—supplies an exact criterion. As Blackburn, J., points out, there may be common employment, though the immediate

² *Accord: Northern Pacific Railroad v. Hambly*, 154 U. S. 349 (1893), track repairer held to be fellow servant with the crews of trains running thereon—"As a laborer upon a railroad track, either in switching trains [Randall v. R. R., 109 U. S. 478 (1883)] or repairing the track, is constantly exposed to the danger of passing trains and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering the service of the company. This is probably the most satisfactory test of liability. If the department of the two servants are so far separated from each other that the possibility of coming in contact and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply," Brown, J., p. 357. The majority of American jurisdictions adopt this view; see *Labatt on Master and Servant*, Vol. II, §498, n. 1, where a great number of cases down to 1901 showing its application to various classes of employees in various businesses are collected. In *Baird v. Pettit*, 70 Pa. 477 (1892), Williams, J., says, p. 482, "Servants are engaged in a common employment when each of them is occupied in service of such a kind that all the others in the exercise of ordinary sagacity ought to be able to foresee, when accepting their employment, that it probably may expose them to the risk of injury in case he is negligent. That this is the proper test is evident from the reason assigned for the exemption of masters from liability to their servants, viz.: that the servant takes the risk into account when fixing his wages. He cannot take into account a risk which he has no reason to anticipate, and he does take into account the risks which the average experience of his fellow has led him (*sic*), as a class, to anticipate." See also, Trenchard, J., in *Harris v. S. S. Co.*, 75 N. J. L. 861 (1908), p. 864: "They were all serving and controlled by the same master in a common employment of such a kind that, in the exercise of ordinary sagacity, all engaged in it were able to foresee, when accepting it, that the negligence of a fellow servant would probably expose them to injury."

object of the labor of the two servants be very different, and if the common object be remote, such as that of making money for the employer³ (the sole nexus of employment suggested as existing between the two captains in this case), there may be no common employment. If a person carried on the occupation of a banker and a brewer in different localities, and his bill clerk was run over by his drayman, it would be strange to say that the two were servants in common employment. I think, therefore, that probably no more complete definition can be formulated than is afforded by the language of Blackburn, J. The consideration that the risk of injury to the one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services.

Tried by this principle, can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might perhaps; for example, it might if all the ships of the company were in the habit of meeting in the same dock, and the safety of each thus became, in the ordinary course of things, dependent on the skill with which the other was navigated. But in regard to navigation on the high seas, or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of another ship of the company than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think, therefore, that these two captains were not in common employment.⁴

CHICAGO & NORTHWESTERN RAILWAY CO. v.
MORANDA, ADMX.

Supreme Court of Illinois, 1879. 93 Illinois, 302.

DICKEY, J.: John Moranda was the foreman of a party of track repairers, whose duty it was to repair and keep in order a section of the railroad track of appellant, and to be upon the

³ *Accord: Connolly v. Davidson*, 15 Minn. 519 (1870), the crews of two river steamers owned by a partnership but operated separately, each under the direction and control of a different partner, held not to be fellow servants.

⁴ *Accord: Connolly v. Davidson*, *supra*, note 2; *McTaggart v. Eastman's Co.*, 57 N. Y. Supp. 222 (1899), a hod carrier engaged in the erection of the walls of an addition to the defendant's premises held not to be a fellow servant of a driver of its delivery wagon.

It would appear that a domestic servant is not regarded as a fellow servant of one employed by such servant's master in his business or manufacturing establishment, *Russell v. R. R.*, 17 N. Y. 134 (1858), p. 137 *semble*, nor is a household servant in a common employment with other servants employed in the stables or about the estate of his master. *Lord McNeill, Grey v. Brassey*, 15 Dunlop (Sc. Sess. Cases, 1852), 135, p. 139.

track and see that it was kept in order for the running of trains.

The hypothesis on which it is sought to sustain the recovery in the circuit court in this case is, that while Moranda was so engaged in his duty an express train passed by at the rate of some thirty to thirty-five miles an hour; that on the approach of the train to the place where Moranda and his party were at work on the track they stepped aside to avoid the passing train, he standing some five or six feet from the nearest rail of the track; and that as the train passed, a large lump of coal was carelessly cast by the fireman from the tender attached to the locomotive, which struck Moranda and caused his death.

This is an action, under the statute, by the administratrix of the estate of deceased. Appellant pleaded not guilty. A trial by jury resulted in a verdict of guilty, and an assessment of plaintiff's damages at the sum of \$4,000, and after overruling a motion for new trial, the court rendered judgment upon the verdict.¹

There is, however, another question raised by counsel for appellant which will necessarily arise upon another trial, and ought therefore to be decided now.

It is insisted that "the plaintiff's intestate and the persons running the locomotive bore such relation to each other in the service of appellant, that one could not recover of the common employer damages caused by the negligence or carelessness of the other."

We think this position is not tenable. In *Chicago and Northwestern Railroad Co. v. Swett*, 45 Ill. 197, a case in which the fireman was killed by reason of the negligence of the track repairers, it was held that the doctrine in relation to fellow servants did not forbid the action.

In *Chicago, Burlington and Quincy Railroad Co. v. Gregory*, 58 Ill. 272, the right of action was sustained where a fireman on a passing train was killed by a "mail catcher" improvidently placed too near the track by other servants of the railroad company. In that case it was said the agents charged with the duty of properly locating the "mail catcher" had no possible connection with the running of trains, in which service the fireman was engaged, and it was added: "The duties were as different and as distinct as those of a conductor and of a track repairer."²

The ancient common law rule which holds a master (even in cases where he is guilty of no fault) responsible for the neglect of his servant, where a third person suffers damage from the negligence of such servants, rests entirely upon considerations of its practical effect upon society—upon considerations of policy; and these considerations of policy rest upon the idea that the

¹ A part of the opinion, holding that the judgment must be reversed for error in allowing the plaintiff to prove that she and her children had no means of support other than her deceased husband's daily earnings, is omitted.

² A large portion of the opinion citing earlier Illinois cases in support of the view adopted and distinguishing the cases cited by the counsel for the appellant, the defendant below, is omitted. Sheldon, J., dissents, filing no opinion.

subordination of the servant to the will of the master and his devotion to the interests of the master give him, under that rule, incentives to caution he would not otherwise have, and upon the idea that the rule will incite the master to greater vigilance in the selection of prudent servants, and to greater zeal in the exercise of his influence over his servant to secure the exercise of care in all cases. When the reason of the rule ceases, the application of the rule ought also to cease, and especially is this true of a rule which rests not upon its own justice, but solely upon considerations of policy. Where servants of the same master are directly co-operating with each other in a particular business at the time of the injury, or are, by their usual duties, brought into habitual consociation, it may well be supposed that they have the power of influencing each other to the exercise of constant caution in the master's work (by their example, advice and encouragement and by reporting delinquencies to the master) in as great, and in most cases in a greater, degree than the master. If, then, each such servant knows that neither he nor his fellow servant, if injured by the others' negligence, can have redress against the master, he has such incentive to constant care, and such incentive to the exercise of his influence upon his fellow to incite him to constant care, that the well-being of society in such case does not demand that the master be made to answer.³ The same considerations of policy which, to avoid injuries to third persons, usually demand that the master be held responsible, seem plainly not to demand it in the case of such co-servants. But though servants are employed by the same master, and are engaged in doing parts of some great work carried on by the master, still, unless either their duties are such that they usually bring about personal association between such servants, or unless they are actually co-operating at the time of the injury in the business in hand, or in the same line of employment, they have generally no power to incite each other to caution by counsel, exhortation or example, or by reporting delinquencies to the master, and the well-being of society in such case must depend upon the devotion of the servant to the interests of the master, and the zeal of the master to promote a constant exercise of due care by his servant; and to bring these instrumentalities into action it becomes necessary (as in the case of an injury to a stranger) to adhere to the general rule that the master must answer for the neglect of his servant, and this, as already suggested, because the facts are such that society cannot, in such case, avail itself of the mutual power and influence of one servant upon another for want of the necessary opportunity for its exercise, and hence must depend for inducements to caution which are supposed to follow the general rule of the master's liability.⁴

³ "The object of the rule is to make such servants vigilant in seeing that others are careful, prudent, and faithful in the discharge of their duty; if not, that it shall be to their interest to report all derelictions that occur." Walker, C. J., *Pittsburgh, etc., R. R. v. Powers*, 74 Ill. 341 (1874), p. 345.

⁴ The doctrine of the principal case prevails also in *Missouri, Sullivan v.*

GAINES, Associate Justice, in *Missouri Pacific Railway Co. v. Williams*, 75 Texas, 4 (1889):

A servant who has the authority to employ other servants under his immediate supervision exercises an important function of his master, and has as full control over them as the master would have were he present, acting in person. The subordinate in such a case is in fact as much the servant of the agent who employs and controls him, as he would be of the master were the latter discharging the functions of his agent. It would seem, therefore, that there is as much reason for holding that a servant assumes the risk of the master's negligence, as for holding that he assumes the risk of the negligence of such a superior employe of his master. He may be presumed to exercise an influence over a co-

R. R., 97 Mo. 113 (1888); *Lanning v. R. R.*, 196 Mo. 227 (1907); *Nebraska, Union Pac. R. R. v. Erickson*, 41 Neb. 1 (1894); *Utah, Dryburgh v. Mining Co.*, 18 Utah, 410 (1898), *Meyers v. R. R.*, 104 Pac. 736 (1909); *Washington, Hammerberg v. R. R.*, 19 Wash. 537 (1898); *Hale v. Crown, etc., Paper Co.*, 105 Pac. 480 (1909); *West Virginia, Madden v. R. R.*, 28 W. Va. 610 (1898), and *Kentucky, Chesapeake, etc., R. R. v. Cavens*, 9 Bush, 566 (1873), for the peculiar position of the Kentucky courts upon this and other similar questions see *Labatt on Master and Servant*, §549, note 1, Vol. 2, p. 1589. In *Tennessee* it is applied to employees of railroads, *Nashville R. R. v. Carroll*, 6 Heisk. 34 (1871), but not to those employed in other businesses, *Coal Creek Co. v. Davis*, 90 Tenn. 711 (1891). *Dicta* favorable to this view are found in *Louisiana* cases, as in *Stucke v. R. R.*, 50 La. Ann. 188 (1898). The doctrine appears to have been adopted at one time in *Georgia, Virginia*, and, perhaps, *Indiana*, *Cooper v. Mullins*, 30 Ga. 146 (1860); *Moon v. R. R.*, 78 Va. 746 (1884), and *Gillenwater v. R. R.*, 6 Ind. 339 (1854), but has been repudiated in the later decisions, which follow the rule laid down in *Northern Pac. R. R. v. Hambly*, 154 U. S. 349 (1893); *Brush Co. v. Wells*, 110 Ga. 192 (1899); *Ga. Coal Co. v. Broadwood*, 131 Ga. 289 (1908); *Norfolk, etc., R. R. v. Nuckolds*, 91 Va. 193 (1895), and *Gormly v. R. R.*, 72 Ind. 31 (1880).

Two servants of the same master are regarded as fellow servants under this rule only where "they are directly co-operating with each other in a particular business in the same line of employment" [the co-operation being only temporary, the servants being generally employed in separate departments, *Abend v. R. R.*, 111 Ill. (1884) 203], "or where their duties bring them into habitual association," so "that they may exercise a mutual influence on one another promotive of proper caution" (*Chicago, etc., R. R. v. Kneirim*, 152 Ill. 458 (1894), as construed in *Chicago, etc., R. R. v. Swan*, 176 Ill. 424 (1898); but see *Illinois, etc., R. R. v. Swisher*, 74 Ill. App. 164 (1897) and *Chicago, etc., R. R. v. Stallings*, 90 Ill. App. 609 (1900), and "can report delinquencies to a common correcting power"; *Relyea v. R. R.*, 112 Mo. 86 (1892), p. 93.

That the two servants are working under the same superior is regarded, in *Missouri*, as decisive as to their being fellow servants, *Dixon v. R. R.*, 109 Mo. 431 (1891); so in *Lanning v. R. R.*, *supra*, the employees were held not to be fellow servants since "each looked to a different individual as the master's representative for directions in his work and had no practical connection with the superior who guided the acts and conduct of the other," p. 660; in *Illinois*, on the contrary, this is not decisive but is regarded as merely a fact, though an important one, for the jury's consideration, *Chicago, etc., R. R. v. O'Brien*, 155 Ill. 636 (1895); but see *R. R. v. Swisher* and *R. R. v. Stallings*, *supra*.

As to the respective functions of court and jury in determining whether fellow service exists, see *Lake Erie, etc., R. R. v. Middleton*, 142 Ill. 550 (1892). For a full collection of cases, down to 1901, illustrating the application of this doctrine to various classes of servants variously associated in various businesses, see *Labatt on Master and Servant*, §506, note 1.

employe who did not employ and has no power to discharge him, calculated to promote care and vigilance on the part of the latter, which he can not or dare not exercise towards one who has the right to terminate his employment. There is reason therefore for adhering to the previous ruling of this court, and for holding that if the plaintiff in this case was under the immediate control of Holmes, and Holmes had the power to employ and discharge the servants under him, Holmes is to be treated as the representative of the company and not the fellow-servant of the plaintiff.¹

SECTION 2.

The Master's Duty to His Servant.

WILSON v. MERRY & CUNNINGHAM.

House of Lords, 1868. L. R. 1st Scotch & Div. App. Cases, 327.

The respondents were the owners of the Haughhead Coal pit in Lanarkshire. The upper seam having been worked out, they determined to work the next underlying seam. In order to open this seam from the side of the pit a scaffold was erected in the side of the pit from and by means of which to drive the level in the new seam. This scaffold was completed on a Saturday and on the following Monday, Henry Wilson, a son of the appellant, was engaged to assist in driving this level and on Tuesday went to work. The scaffold as erected interrupted the ventilation of the mine, and it appears that in consequence fire-damp accumulated beneath the platform of the scaffold, and on the Wednesday, while the appellant's son was searching, with a light, for a missing tool, his light came in contact with the fire-damp, an explosion took place and he was killed. .

It was not suggested that the respondents themselves took any part in the erection of the scaffold, nor was any personal fault attributed to them. The general manager of their works in Lanarkshire was Mr. Jack. The manager of the pit was John Neish. Under him was a man named Bryce, who attended to the underground operations. The charge of sinking the pit, and making arrangements underground for working it, was given to Neish. It was proved at the trial that Jack and Neish were competent persons for the work on which they were engaged; selected by the respondents with due care; and furnished by them with all necessary materials and resources for working in the best manner.

¹ *Accord: Bryan v. R. R.*, 128 N. C. 387 (1901), and see *Denver, etc., R. v. Driscoll*, 12 Colo. 520 (1889).

The master is as much liable for the negligence of a superior servant to whom is intrusted the power to employ and discharge subordinates, whether it consist of an improper exercise of some authority conferred upon him by virtue of his position or a mere slip or carelessness in a matter of mere manual detail, such as is usually left to an ordinary workman. *Sweeney v. R. R.*, 84 Tex. 433 (1892).

The cause was tried before Lord Ormidale and a verdict found for the appellant, assessing damages £100. Two exceptions were taken to Lord Ormidale's directions to the jury; the second of which was allowed by the Court of Sessions and a new trial granted. It is on this exception alone that your Lordships are now called to express an opinion, the appellant having appealed against the interlocutor of the Courts of Session allowing the exception.

This exception was taken to a part of Lord Ormidale's directions to the jury, in which he charged them that "if they were satisfied on the evidence that the arrangement or system of ventilation in the Haughhead pit at the time of the accident had been designed and completed by Neish before the deceased, Henry Wilson, was engaged to work in the pit and that the defenders had delegated their whole power, authority and duty in regard to that matter and also in regard generally to all the underground operations without control or interference on their part, the deceased, Henry Wilson, and Neish did not stand in the relation of fellow workmen engaged in the same common employment, and the defenders were not on that ground relieved from liability to the Pursuer for the consequences of fault if any there was on the part of Neish in designing and completing said arrangement, or system of ventilation."¹

The LORD CHANCELLOR (Lord Cairns): "My Lords, I do not think the liability, or non-liability, of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense, the fellow workman, or *collaborateur*, of the sufferer. In the majority of cases in which accidents have occurred the negligence has, no doubt, been the negligence of a fellow workman; but the case of the fellow workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand upon higher and broader grounds. As is said by a distinguished jurist: *Exempla non restringunt regulum, sed loquuntur de casibus crebrioribus* (*Donnellus de Jure Civ.*, L. 9, c. 2, n). The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servants to do. The master has not contracted or undertaken to execute in person the work connected with the business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper

¹ Only a part of the opinion of the Lord Chancellor is given and the facts above set forth are slightly condensed from those given by him in his opinion.

and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skillful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow workmen. As was said in the case of *Tarrant v. Webb*, 25 L. J. (N. S.), C. P. 263, negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants."²

Interlocutor affirmed, and appeal dismissed with costs.

²It would appear that, at least until after the passage of the Employers' Liability Act of 1880, the master was liable only if personally guilty of some lack of care for the servant's safety, and that he was regarded as having fully performed his duty when he had employed a competent manager or superintendent to manage the business and had supplied him with suitable and sufficient materials and resources for properly conducting it. See the cases cited by Nesbitt, J., in his dissenting opinion in *Canada Woolen Mills v. Traplin*, 35 S. C. Canada, 424 (1904), and see "Employers' Liability in England prior to the Act of 1880," by J. T. Carey, 58 Am. L. Reg. 259. It was, however, held in that case by the majority of the court, that a corporation is liable for injuries received by fall of an elevator allowed to fall into disrepair, though it had been held in *Wilson v. Hume*, 30 U. C. C. P. 542 (1880), that the owners of a vessel were not liable for the negligent selection of incompetent sailors by the captain.

While in *Wonder v. R. R.*, 32 Md. 411 (1870); *Columbus, etc., R. R. v. Arnold*, 31 Ind. 174 (1869); and, perhaps, *Albro v. Agawam Canal Co.*, 6 Cush. 75 (1850), it is intimated that a master owes no duty beyond employing competent foremen and superintendents—this very restricted idea of the master's liability has universally given place to the conception that the master is bound to answer for the care with which those to whom he entrusts the selection of his servants, or the preparation or maintenance of a safe and proper plant or premises, perform these powers; *Gilman v. R. R.*, 13 Allen (95 Mass.) 433 (1866); *Snow v. R. R.*, 8 Allen (90 Mass.) 438 (1864); *Ford v. R. R.*, 110 Mass. 240 (1872), and that he is bound to exercise an oversight over his business sufficient to detect any obvious ill management. *Rice v. King Philip Mills*, 144 Mass. 229 (1887), per Field, J., pp. 235-236, and see *Dill v. Marmon*, 164 Ind. 507 (1905).

Compare with the principal case such statements as that of Brewer, J., in *Northern Pacific R. R. v. Dixon*, 194 U. S. 338 (1903), p. 346, "A momentary act of negligence is charged against the telegraph operator. No reasonable amount of care and supervision which the master had taken beforehand would have guarded against such unexpected and temporary acts of negligence. Before an employee should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the accident."

So in *American Bridge Co. v. Seeds*, 144 Fed. 605 (C. C. A. 6th Circ., 1906), Sanborn, J., distinguishes, p. 611, "risks of operation," which the servant assumes, from risks "of construction or provision" from which he may expect the master to protect him; and see Holmes, J., *Kalleck v. Deering*, 161 Mass. 469 (1894), p. 470, and Gillett, J., *Dill v. Marmon*, 164 Ind. 507 (1905), p. 520.

In *Ashcroft v. Stanwix*, 3 Ellis & Ellis, 701 (Eng., 1861), it was held that notice to one partner of a defect was notice to the other, and it is intimated that the personally innocent partners who take no part in the conduct of the business are liable for the negligent acts of a managing partner. See also, *Mellors v. Shaw*, 1 B. & S. 437 (1861, Eng.), but cf. *Crispin v. Babbitt*, post

CHURCH v. CHICAGO, MILWAUKEE & ST. PAUL
RY. CO.

Supreme Court of Minnesota, 1892. 50 Minn. 218.

MITCHELL, J.: Taking the admissions in the pleadings, the evidence admitted, and accepting as true all that plaintiff offered to prove, the facts in this case were as follows:

Plaintiff had been in the employment of the defendant as a brakeman on a freight train running east of Calmar, Iowa. Having been taken ill, he had gone, on a leave of absence, to his home in Northfield, Minn. On the day in question he went down to defendant's depot in Northfield, for the purpose of writing or telegraphing to Austin for a pass over defendant's road to go back to his work. While he was at the depot a wrecking train came into the station in charge of a conductor, and with an engineer, fireman, and two brakemen, one of whom is called "head brakeman." This train was on its way to pick up a wreck, and, in addition to an engine and tender, consisted of two or more flat cars, upon one of which was loaded a derrick, and on another two pair of heavy car trucks. After the train pulled into the station the trainmen proceeded to switch the cars and transpose them so as to put the "derrick car" in the rear, and place the "truck car" next in front of the derrick. On its arrival the conductor left the train to attend to his other usual duties at the station while this switching was being done, the head brakeman being in charge of the switching movements of the train.

While this switching was going on, the head brakeman being on the cars and the other brakeman at the switch, and a third man being necessary (as plaintiff offered to prove) to do the switching, the head brakeman, seeing plaintiff standing by, requested him to get onto the cars and assist. The plaintiff did so, and while thus engaged sustained the injuries complained of, caused, as is claimed, by reason of the trucks on the flat car not being properly blocked.

It was necessary for the plaintiff to establish, as the essential foundation of his right to recover, the existence of the relation of master and servant between himself and the defendant company, and this in turn depended upon the authority of the head brakeman to employ him to assist in the switching.

In our opinion, none of the evidence introduced or offered had any tendency to prove any such relation between plaintiff and defendant, or any such authority on the part of the head brakeman. The fact that plaintiff had been or was in the employment of the defendant elsewhere is wholly unimportant. He was not at the station on defendant's business. He was not an employee of defendant at that place or as to the switching of that wrecking train. The case stands precisely as if the head brakeman had called on any other bystander at the station to assist. While the head brakeman had charge of the movements of the train in doing this switching during the temporary absence of the conductor from the cars on other business, yet this was the entire scope and extent of his authority. The conductor had not abdicated the general charge and control

of the train, or turned it over to the brakeman. The latter had no authority, actual or apparent, express or implied, either from custom or from any present pressing emergency, to employ additional brakemen, either permanently or temporarily. It was wholly immaterial whether two brakemen were or were not sufficient to do the switching. Even if they were not, that fact would not, under the circumstances, give a mere brakeman authority to employ an additional force. If any one on the ground had any implied authority to do so it was the conductor, who had charge and control of the train. In doing what he did the plaintiff was, therefore, a mere volunteer, and, as such, assumed all the risks incident to the position. The defendant did not bear to him the relation of master or employer, and owed him no duty as such. *Flower v. Pennsylvania Railroad Co.*, 69 Pa. St. 210; *Sherman v. Hannibal & St. J. R. Co.*, 72 Mo. 62; *Sparks v. East Tennessee, V. & G. Ry. Co.*, 82 Ga. 156 (8 S. E. Rep. 424); *Everhart v. Terre Haute & I. Ry. Co.*, 78 Ind. 292; *Rhodes v. Georgia Railroad & Banking Co.*, 84 Ga. 320 (10 S. E. Rep. 922); *Atchison, T. & S. F. Ry. Co. v. Lindley*, 42 Kan. 714 (22 Pac. Rep. 703).¹

Counsel for plaintiff has cited no case which sustains his contention in this case. Many of those which he cites have no bearing whatever upon the question here involved. There are cases which hold that, where a regular brakeman is absent, and the proper and safe management of the train so requires, the conductor in charge has authority to supply the place of the absent brakeman. Such, for example, are the cases of *Sloan v. Central Iowa Ry. Co.*, 62 Iowa, 728 (16 N. W. Rep. 331), and *Georgia Pac. Ry. Co. v. Probst*, 83 Ala. 518 (3 South Rep. 764).² And if any sudden or unexpected emergency should arise, such that the safety of the train demanded an extra force of brakemen, probably it would be held that it was within the implied authority of the conductor to employ them. But such cases are clearly distinguishable from the present, where a mere brakeman, without the knowledge of and without authority from the conductor in charge of the train, and in the absence of any sudden emergency, assumed to call upon a bystander to assist in switching.³

Another line of cases cited by counsel is clearly distinguishable from the present one. They are those where one assists the servants of another at their request for the purpose of expediting his own business or that of his master. Such is the cases of *Eason v. S. & E. T. Ry. Co.*, 65 Tex. 577.⁴ The case of *Street Ry. Co. v. Bolton*, 43 Ohio St. 224 (1 N. E. Rep.

¹ Accord: Also *Evarts v. R. R.*, 56 Minn. 141 (1894), p. 146, *semble*; *Mickelson v. R. R.*, 23 Utah, 42 (1900); *Nashville, etc., R. R. v. McDaniels*, 12 Lea (Tenn.), 386 (1882).

² That it was physically possible to operate the train with less than the full crew, as shown by the fact that it had been safely done for part of the journey, is not decisive; it is still a question for the jury whether the employment of temporary assistance was necessary. *Fox v. R. R.*, 86 Iowa, 368 (1892).

³ See accord, *Little v. Neilson*, 17 Dunlop (Scotland), 310 (1855).

⁴ See ante, p. 364.

333), is also referable to the same class. See, also, *Holmes v. North Eastern Ry. Co.*, L. R. 4 Exch. 254, affirmed L. R. 6 Exch. 123. The decisions in this class of cases are placed upon the ground that, though performing a service beneficial to both, the party is doing so in his own behalf, and not as the servant of the company, and is entitled to the same protection against its negligence as if attending to his own private affairs. See, also, *Thomp. Neg.* 1045, and cases cited.

Neither is the case of *Johnson v. Ashland Water Co.*, 71 Wis. 553 (37 N. W. Rep. 823), so much relied on by counsel, particularly in point. The question there arose merely on demurrer to the complaint, and the decision is merely made to rest upon the fact that the complaint alleged that the person who employed the plaintiff to assist was at the time the superintendent having charge and control of the work.⁵

There was no error in excluding the evidence offered by plaintiff, and consequently the order appealed from must be affirmed.⁶

⁵ "The plaintiff was engaged in the defendant's work at the request of the man in charge of the work; and, although it may be said that his employment was for a mere temporary purpose, and that the plaintiff was not expecting any pay for the work done, and in that sense the employment was voluntary, still, being in the defendant's employment at the request of its servant or foreman, he was not a trespasser, and he was, for the time being, the servant of the defendant and entitled to the same protection as any other servant of the defendant." Taylor, J., 71 Wis., p. 556.

⁶ The defendant's liability depends in each case upon whether his employee, who either requested the plaintiff's assistance or accepted the latter's services, offered by him unasked (it is immaterial which, Thayer, J., *Central Trust Co. v. R. R.*, 32 Fed. 349 [1887], p. 451, as to what constitutes acceptance by acquiescence, see *Mickelson v. R. R.*, *supra*), has by virtue of his rank and position, the nature of work entrusted to him, or by reason of some sudden emergency, authority, express or implied, to employ, under the circumstances of the particular case, temporary assistance, paid or gratuitous.

A superintendent, or other superior employee, to whom is entrusted the selection of servants, has clearly authority to employ temporary assistance to fill a vacancy due to the absence of one of the regular staff, *Button v. R. R.*, 87 Wis. 63 (1894), and if entrusted with complete control of the business he has authority to temporarily increase at his discretion the staff of workmen by enlisting the plaintiff's services. *Central Trust Co. v. R. R.*, *supra*; *Consolidated Co. v. Bruce*, 154 Ill. 454 (1894); *Johnson v. Ashland*, cited in principal case.

If a piece of work has been left to a servant, who has full discretion how to perform it, he is ordinarily held to have authority to employ such assistance, temporary or permanent, as he may require. *Penna. Co. v. Gallagher*, 40 Ohio St. 637 (1884), especially if the work is such that he cannot reasonably be expected to do it without aid, *Patnode v. Warren Mills Co.*, 157 Mass. 283 (1887). So, when a mill operative or miner is paid by the piece or the tonnage mined, and the work requires assistance, and is done in the mill or mine, the relation of master and servant is held to exist between the mill or mine owner and the assistants, though selected and employed by the operatives or miners and paid by them. *Rummell v. Dilworth*, 111 Pa. 343 (1886).

While the master is clearly not liable when one of his servants, of whatsoever grade, obtains outside assistance to lighten his own labor or that of his subordinates, and purely for his or their personal convenience and relief, *Nashville, etc., R. R. v. McDaniel supra*; *Sparks v. R. R.*, 82 Ga. 156 (1888); *Atchison, etc., R. R. v. Lindley*, 42 Kans. 714 (1889), it is often a difficult question of fact whether the plaintiff's services were requested

FARMER v. KEARNEY.

Supreme Court of Louisiana, 1905. 115 Louisiana, 722.

Appeal from Civil District Court, Parish of Orleans. Judgment for defendant, and plaintiff appeals.

NICHOLLS, J.: The plaintiff in this suit was severely injured while engaged as a screwman, loading cotton in the hold of the steamship Chancellor. The injury was caused by the falling into an open hatchway of a bale of cotton which was being loaded into the vessel. He was not in a position to see or know exactly how or through whose instrumentality the bales fell, but he charges that the cotton was loaded into the ship by means of a derrick and appliances connected with the same; that the bale which struck him was one of two bales which were not well fastened and secure in the sling attached to the derrick, and that the parties operating the derrick and its appliances operated the same in too great haste while lowering them into the hold of the ship; that the bight of the sling that took hold of the cotton and lowered it into the hold was entirely too long, and the bale which struck him was loosened and fell out of the sling. He alleges that defendant was the stevedore employed to load the vessel (at the time of the injury received by him), in charge of the gang operating the derrick from which the bale of cotton fell which injured him; that the stevedore, Kearney, his agents, servants, and employes operating the derrick and its appliances, were guilty in so operating them of gross negligence and fault, want of due care and ordinary skill.

The case is submitted to us with a claim to liability on the part of the defendant as an employer under circumstances very exceptional in character.

In the brief filed on behalf of the defendant, his counsel say:

"It is evident that the commerce of the port of New Orleans is handled by two associations—the Longshoremen's Benevolent Association, which handles cotton up to the time that the sling is attached to the hoist, and the Screwmen's Association, which handles it from that time until it reaches the hold of the ship.

"These two associations control absolutely the commerce of the port, forming together what is known as the 'Dock and Cotton Council,' and enforcing the rules of this council by boycott or strike. The Screwmen's Association refuses to take cotton from anybody but members of the Longshoremen's Association, and the Longshoremen's Association refuses to deliver the cotton to anybody but members of the Screwmen's Association.

for the servant's convenience, or because they were necessary for the proper conduct of the master's business, see *R. R. v. Harrison*, 48 Miss. 112 (1873).

As to whether a plaintiff injured on the defendant's premises while assisting the defendant's servants solely for the latter's convenience, can recover for injuries due to the reckless misconduct of other servants of the defendant, who knew of his presence and danger (see *East Kentucky R. R. v. Powell*, ante, p. 216). compare *Mitchell, J.*, in *Evarts v. R. R.*, 56 Minn. 141 (1894), with *Bramwell, B.*, in *Degg v. Midland Ry. Co.*, 1 H. & N. 773 (1857).

"The stevedore does not, and is not allowed to, come in contact with the individual. He cannot employ the individual, but must employ an entire gang, which is made up of members of this association among themselves, and to which they designate one of themselves as foreman. These screwmen are supreme aboard ship. They handle the cotton from the moment the sling is attached to the hoist. One of the rights which they demand is that one of the gang must operate the winch. They themselves select the man who is to operate the winch. The stevedore is not allowed any choice in the matter, and on the day of the accident the screwman and the members of the gang in which plaintiff worked, designated 'Tony,' one of their gang, to operate the winch.

"Every witness in this case, including the plaintiff himself, has testified that the stevedore is not allowed any choice in the selection of the winchman, and if, on the day in question, the defendant had put the most expert machinist to operate this winch, all of the screwmen would have left the work, and would have declined to return to work until one of their number had been reinstated at the winch."

The plaintiff and his fellow workmen were engaged in loading cotton from the wharf into the hold of the ship. The operation consists in hoisting the cotton from the wharf by means of a steam winch and lowering it into the hold, where it is stored. This work is subdivided by the arbitrary regulation of a certain element of labor in the city of New Orleans. The cotton is handled on the wharf and the rope attached to the hoisting gear by a class of men called "Longshoremen." The hoisting gear is operated and the cotton detached therefrom and stored by a class of men called "Screwmen." Under the regulations which these labor associations have established, and as conditions imposed by them, the longshoremen will not handle the cotton that is not hoisted and stored by screwmen, and the screwmen will not hoist and store cotton that is not handled by the longshoremen. Whatever, therefore, may be the particular work that these respective laborers may be assigned to, it is evident they are engaged in the common work and undertaking of loading cotton from the wharf into the hold of the ship. The man operating the winch was a screwman, and belonged to the same gang as the plaintiff. The hoisting of the cotton by means of the steam winch and lowering it into the hold, where it is detached and placed in position, is a common work or undertaking. It is evidently considered such by the screwmen themselves, for the reason that in the gangs which they make up to do this work they always include and require the master to employ one of their men to operate the steam winch. On the occasion of this injury the steam winch was operated by one of plaintiff's fellow gangmen or workers.¹

The evidence establishes that, while the longshoremen's organization and the screwmen's organization are distinct and separate

¹ A portion of the opinion is omitted containing, *inter alia*, excerpts from the defendant's testimony proving the existence of substantially the conditions set forth in his counsel's brief.

associations, they none the less, by some kind of an agreement made between themselves, act in concert as to working or refusing to work. The violation by a stevedore of the rules and regulations of one of the two associations is practically and substantially acted upon as a violation of the rules and regulations of the other.

When a person contracting for work which he engaged to do needs a number of workmen to perform the same, the individual workmen employed rely upon the contractor's having and exercising proper knowledge, skill and prudence in the selection of the workmen other than themselves; that he will see to it that they each have proper knowledge, skill and prudence. They rely, also, upon his exercising himself (or through some one whom he selects to represent him) due care, knowledge, and prudence in superintending the workmen as they work; that he will see that they perform their work properly. The workmen may, however, elect in any particular case, as between themselves and the contractor, to relieve the latter from these duties and obligations, and the responsibility resulting from their nonperformance, by selecting agencies of their own choice, to which they look for their own proper protection, and which they substitute for that purpose for the contractor. The responsibility of the contractor rests upon freedom of action in the selection of the workmen and in his superintendence over them. When the individual workmen, instead of allowing matters to take their usual shape and course, make it a condition of their consent to accepting service that he (the contractor) will yield in their favor this right of freedom of action as to selection and superintendence, they absolve him from responsibility which would otherwise be thrown upon him and look to that of their own selected agencies. When the workmen delegate to a labor organization which they have joined (and to others in privity with their own organization) the right of selection and superintendence, they agree to accept the membership of their fellow workmen in those organizations, and the action of those associations, *ipso facto*, as a good and sufficient guaranty to them for their individual safety and protection, so far as the contractor is concerned. If they deem membership in organizations as conferring benefits upon them, they cannot accept the benefits and repudiate the resulting legal disadvantages.

For the reasons assigned herein, it is hereby ordered and decreed that the judgment appealed from be, and it is hereby, affirmed.²

²So it has been held in Pennsylvania and West Virginia that where an act of the legislature requires every mine owner who desires to operate his mine to employ a mine foreman who shall have been examined by a state mining board and received from it a certificate of competency, and imposes upon such foremen certain specified duties, among which is that of making periodical inspections of the working places and of seeing that they are in safe condition—the mine owner is not liable to a servant injured by the fall of the roof of the gallery or drift where he was working due to the failure of the mine boss to perform his statutory duty—the foreman representing the state which requires the owner to employ him or some other of the limited class of certified foremen, *Reese v. Biadle*, 112 Pa. 79 (1886);

McELLOGGOTT, ADMTX., *v.* RANDOLPH *ET AL.*

Supreme Court of Errors, 1891. 61 Connecticut Repts. 157.

PRENTICE, J.: The plaintiff's intestate was in the employ of the defendants, and while so employed was accidentally killed. He left a widow, three minor children, and one child *in ventre sa merc.* The complainant alleges that the intestate's death was caused by the defendants' negligence, and claims damages laid at \$5,000. The defendants having suffered a default, the damages were assessed by the court, and \$1,000 awarded. Both parties appeal.¹

The deceased was one of two hundred factory operatives employed by the defendants. In the wheel-pit of the defendants' factory was a large gear wheel, weighing upwards of twelve tons, which it was desired to remove. The work was one of some difficulty and required the exercise of mechanical skill. It was by the defendants entrusted to one Dunning, who was the master-mechanic of the factory and a capable machinist. For the performance of the work he selected from the defendants' hands ten men, the best adapted for the work. These men were not skilled or trained in mechanical work. With competent instructions, oversight and direction, however, they were competent to perform the work. Otherwise they were incompetent. Among these ten men was McElligott. In order that the removal of the wheel might interfere as little as possible with

Williams v. Thacker Coal Co., 44 W. Va. 599 (1898); and a provision in such an act that the owner shall be liable for foreman's neglect to perform his statutory duties is unconstitutional and void, *Durkin v. Kingston Coal Co.*, 171 Pa. 193 (1895); *Hall v. Simpson*, 203 Pa. 146 (1902).

On the contrary, a very similar Illinois statute, differing only in this that it did not require the owner to employ certified foremen, etc., but forbade the employment of any not so certified, was held to make the owner liable for the failure of such foreman to properly perform his duty and to be constitutional. "In legal effect, duties are imposed upon the mine owner, customarily performed for him by certain employees, duties which substantially relate to the furnishing of a reasonably safe place for the workmen. The subject was one peculiarly within the police power of the State," and "though the liability imposed upon the mine owner to respond in damages for the willful failure of the mine manager * * * to comply with the requirements of the statute was not in harmony with the principles of the common law applicable to the relation of master and servant, it (is) competent for the State to change and modify those principles in accordance with its conceptions of public policy," and it not being "obligatory upon a mine owner to select a particular individual or to retain one when selected if found incompetent" [the object being merely to guard against the possibility of the proprietor employing incompetent, intemperate, negligent or disreputable persons, *Henrietta Coal Co. v. Martin*, 221 Ill. 460 (1906), p. 467], "the act is not repugnant to the Fourteenth Amendment in any particular." *White, J., Wilmington, etc., Co. v. Fulton*, 205 U. S. 60 (1907), pp. 73 and 74—and see same case in Circuit Court of Appeals, 133 Fed. 1903 (1904) and Illinois cases cited therein.

In Pennsylvania the owner, though not liable for the negligence of a mine foreman, is liable if he fail to supply him with proper materials and supplies for the performance of his duties, *Saylor v. Coal Co.*, 31 Pa. T. C. 447 (1906).

¹ That portion dismissing the plaintiff's appeal, based on an alleged error in the assessment of damages, is omitted.

the operation of the factory, the work was performed during the night. The wheel was made up of ten sections. These sections were removed independently. About midnight, some of the sections having been removed, Dunning was induced by the entreaties of his little boy, who was present, to go home. The work grew more difficult as the removal progressed. By the removal of the fifth section, Dunning having then left, the wheel was put out of gear with the gear wheel on the engine shaft, and it became necessary to support it. Dunning had foreseen this contingency, and had given instructions for the use of a certain wooden horse for the suspension of a set of blocks and falls for the purpose of supporting and holding in place the remaining sections of the wheel when it should become out of gear. After Dunning's departure, one Johnson was regarded as the foreman of the work. He, like his fellows, was without mechanical training or skill.

When support for the wheel became necessary, one of the workmen attached the horse and falls and blocked it up from beneath, getting ropes and materials from the defendants' stock, near at hand, and containing a sufficiency of suitable material as well as other material insufficient and unsuitable. Neither the rope nor the material used for blocking, nor their adjustment was ever examined by anyone. After this was done, the deceased was sitting upon the hub of the wheel engaged in his work when the rope and horse gave way and the wheel fell into the pit killing him.²

²The statement of facts is slightly condensed from that given in the opinion.

The master, whether acting in person or through a subordinate, is bound to act only as a reasonably prudent man having due regard for his servant's safety would act under the circumstances of each particular case. He is not bound to take minute precautions incompatible with the efficient and profitable conduct of his business, in order to guard his employees against merely possible dangers, *Shea v. Wellington*, 163 Mass. 364. (1895), p. 369; nor is he liable for a failure of his representative to do that which it would be unreasonable to require the master to do, if present and himself directing the operation of the work. Compare *O'Neill v. R. R.*, 80 Minn. 27 (1900) and *King v. McClure*, 222 Pa. 625 (1909), where it was held that "there is no rule of law which requires a master, by himself or his representative, to be always present to ward off every transient peril," with *Whitley v. Evans*, 30 Pa. S. C. 41 (1906), p. 46, where the master was personally superintending the moving of heavy machinery. So it is generally held that a master discharges his duty to furnish safe appliances by purchasing them from experienced and reputable manufacturers and by subjecting them to such inspection as the nature of the article admits of. *Norton v. R. R.*, 81 Mich. 423 (1900); *Richmond, etc., R. R. v. Elliott*, 149 U. S. 266 (1893); *Ardesco Co. v. Gilson*, 63 Pa. 143 (1869), *semble*; *McEnery v. R. R.*, 91 Pa. 185 (1879), carries this rule to a point seemingly in conflict with the late decisions of the same court, holding that a carpenter and bridge builder was an independent contractor, though employed by the day and working under the direction and control of the defendant's superintendent.

There are *dicta* in some cases *contra*: *Burnes v. R. R.*, 129 Mo. 41 (1895); *Herdler v. Buck Stove Co.*, 137 Mo. 3 (1896); *Morton v. Barr Dry Goods Co.*, 126 Mo. App. 377 (1907), but see pp. 387 to 389; *Toledo Brewing Co. v. Bosch*, 101 Fed. 530 (C. C. A. 6th Circ., 1900); but the actual decisions go no further than to hold that a master cannot trust implicitly to the competence and care of his contractor, but must make an independent inspection of the safety of the appliances furnished to his servants or the place where he

The cause of the accident was, in the language of the finding, "the inadequacy of the support, the rope being insufficient in size and strength for the strain upon it, and the support by which the wheel was blocked being also inadequate, improperly placed to sustain the weight to which it was adapted, and the whole arrangement and device was in the highest degree unsuitable and insecure in view of the weight to be supported and the extreme hazard involved." Upon these facts the defendants claim that they had performed their whole duty in the premises in that they had provided competent and suitable persons to oversee, direct and do the work, and also suitable and sufficient appliances, tools and materials therefor.

The rule of duty of master to servant is well settled in this State. It is the master's duty to exercise reasonable care to provide for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and fit and competent persons as his co-laborers. It is equally well settled that performance of these duties cannot be effected by the simple giving of an order,—by their execution being entrusted to another. The designation of an agent, however fit and competent that agent may be, for the execution of the master's duties, does not fill out the sum of the master's obligation, nor serve to relieve the master from further responsibility. Until the agent thus selected and empowered in fact acts up to the limit of the duty of his master to act, the master's duty is not done. The master's duty requires performance. He may at his option perform in person or delegate performance to another. In either case reasonable care must be exercised in the doing of the act required to be done by the master. *Wilson v. Williamantic Linen Co.*, 50 Conn. 433; *Laning v. N. York Central R. R. Co.*, 49 N. York, 521; *Hough v. Texas & Pacific Railway Co.*, 100 U. S. R., 213; *Davis v. Central Vermont R. R. Co.*, 55 Verm., 84; *Ford v. Fitchburg R. R. Co.*, 110 Mass., 240; *Harper v. Indianapolis & St. Louis R. R. Co.*, 47 Mo. 353; *Brodeur v. Valley Falls Co.*, 16 R. Isl., 448; *Chicago & N. Western R. R. Co. v. Jackson*, 55 Ill. 492.

Examining the facts of the case with reference to these legal principles, we observe that while it is true that the defendants entrusted the execution of the work upon which McElligott was engaged to a competent superintendent, provided him, McElligott, with co-laborers who were fit and competent when under competent supervision, and had upon the premises appliances and apparatus suitable for the work, it is equally true that, during the progress of much of the work, and at the time of and for a considerable time prior to the accident, the work was wholly without competent superintendence, that there was even no one present who was pos-

puts them to work. *Moran v. Corliss Co.*, 21 R. I. 386 (1899); *G. C. R. R. v. Delaney*, 22 Tex. Civ. App. 427 (1900); *Vickers v. K. & W. V. R. R.*, 64 W. Va. 474 (1908), 20 L. R. A. N. S. 793, with note. *Contra, N. & W. R. R. v. Stevens*, 97 Va. 632 (1899). So in *Story v. R. R.*, 70 N. H. 364 (1900), a railroad company was held liable for the condition of the tracks of another company over which they had running rights; *cf. Hoody v. R. R.*, 123 N. W. 815 (Minn., 1909).

sessed of mechanical skill, that the provision of suitable appliances was simply in the sense of there being such near at hand mingled with others unsuitable, that those appliances which were in fact chosen and set apart for the work were mainly selected by unskilled factory hands, at random and without instructions, oversight or examination, and that they were adjusted by like laborers with the like absence of instructions, oversight and examination.

The accident happened in part because a certain wooden horse or support was inadequate. Dunning, the superintendent, selected this particular appliance and directed its use. The wheel fell in fact because a certain rope was too small and inadequate. The defendants had done nothing to provide a suitable rope except to have upon the premises a stock of various kinds of rope, some suited to one purpose and some to another, and to allow any chance inexperienced laborer to select for each special use the one which his impulse dictated. Just here we touch upon the most significant and potent factor in the situation, namely, the entire absence of competent superintendence during all the later stages of the work. After Dunning's departure about midnight there was no one, either over or connected with the gang of men employed, who possessed any mechanical knowledge or skill. Had Dunning remained present properly executing his master's duty entrusted to him, there would have been no such unintelligent, haphazard selection of apparatus, no such inadequate and unsuitable devices of support, as were instrumental in McElligott's death. Moreover, Dunning's departure in an instant transformed McElligott and his fellows from fit into unfit co-laborers. The finding states explicitly that these men were incompetent for the work assigned them without suitable supervision. During the hours therefore which succeeded Dunning's return home, McElligott was surrounded only by incompetent fellow-workmen, and he went down to his death in consequence of constructions and mechanical adjustments made by his fellow-servants employed by the defendants to do, in company with him, what they were unfit to do. Plainly, therefore, the defendants' duties as masters of the deceased were not performed.

The defendants' counsel in their brief urge that, as their clients had entrusted the execution of the work to a competent agent, they were relieved from further responsibility. This position, as we have already indicated, is not well taken.

The true rule makes the character of the act or omission wherein the negligence exists, the test of the master's responsibility therefor. One may in some of his acts be executing his master's duty towards the master's servants, while in others of his acts he is simply a fellow-servant, of the same or of a higher or lower grade. The master's responsibility or non-responsibility in case of injury is determined, not by the rank or grade of the offending servant, but by the character of the particular act or omission to which the injury is attributable. 7 Am. & Eng. Encyclopedia of Law, §§ 824, 834; Wood's Master & Servant, 871, § 438; *Davis v. Central Vermont R. Co.*, 55 Verm., 84; and the other cases last cited.

There was no error in the judgment complained of.

(a) Duty to Superintend and Issue Commands.

CRISPIN *v.* BENJAMIN T. BABBITT.*Court of Appeals of New York, 1880. 81 N. Y. 516.*

Appeal from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been sustained by defendant's negligence.

The plaintiff was working as a laborer in the defendant's iron works. It became necessary to pump the water out of a dry dock; this was done by means of a pump driven by an engine. While the plaintiff was, with others, engaged in lifting the fly wheel of the engine off its center, one John Babbitt carelessly started the engine, thereby causing the plaintiff's injuries. Defendant, who lived at a distance from his works, visited them only one or two days every month and left the general charge of them to Babbitt, who was at one time general superintendent and manager and at another time styled "business and financial man."¹

RAPALLO, J.: The liability of a master to his servant for injuries sustained while in his employ, by the wrongful or negligent act of another employe of the same master, does not depend upon the doctrine of *respondeat superior*.

If the employe whose negligence causes the injury is a fellow-servant of the one injured, the doctrine does not apply. (*Conway v. Belfast, etc., Ry. Co.*, 11 Irish C. L. 353.)

A servant assumes all risk of injuries incident to and occurring in the course of his employment, except such as are the result of the act of the master himself, or of a breach by the master of some term, either express or implied, of the contract of service, or of the duty of the master to his servant, viz.: to employ competent fellow-servants, safe machinery, etc. But for the mere negligence of one employe, the master is not responsible to another engaged in the same general service.

The liability of the master does not depend upon the grade or rank of the employe whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. (*Albro v. Agawam Canal Co.*, 6 Cush. 75; *Conway v. Belfast Ry Co.*, *supra*; *Wood's Master and Servant*, § 438. See, also, §§ 431, 436, 437.) On the same principle, however low the grade or rank of the employe, the master is liable for injuries caused by him to an-

¹ The facts are substantially those given by the reporter. The substance of the evidence, as to the position occupied by Babbitt and the particulars as to the accident, are fully set forth in the dissenting opinion of Earl, J., which is omitted.

other servant, if they result from the omission of some duty of the master, which he has confided to such inferior employe. On this principle the *Flike case* (53 N. Y. 549) was decided. Church, Ch. J., says, at page 553: "The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. *As to such acts* the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employe performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employe performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance. (Wood's Master and Servant, § 438.) The citation which the court read to the jury from 21 Am. Rep. 2 does not conflict with, but sustains this proposition. It says: "Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent *in supplying and maintaining suitable instrumentalities for the work required is a breach of duty for which the master is liable.*"² These were masters' duties. In so far as the case from which the citation is made goes beyond this, I cannot reconcile it with established principles. In England, by a late act of Parliament, the rules touching the point now under consideration have been modified in some respects, but in this State no such legislation has been had.

The point is sharply presented in the present case, by the 13th, 14th and 17th requests to charge. 13th. That although John L. Babbitt may, as financial agent or superintendent, overseer or manager, have represented defendant, and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer or manager.

This the court charged.

14th. That as to any other acts or duties performed by him in and about the defendant's works or business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employe or servant of the defendant, and a fellow-servant of the plaintiff.

This the court refused to charge, but left as a question of fact to the jury, and defendant's counsel excepted. I think this was a question of law, and that the court erred in submitting it to the jury, but should have charged as requested.

The court was further specifically requested to charge that

² This statement is a condensation of a part of the opinion of Woodward, J., in *Mullan v. P. & S. S. S. Co.*, 78 Pa. 25 (1875), p. 32.

in letting on the steam John L. Babbitt was not acting in defendant's place. This, I think, was a sound proposition, as applied to the present case. It was the act of a mere operative for which the defendant would be liable to a stranger, but not to a fellow-servant of the negligent employe. As between master and servant it was servant's, and not master's, duty to operate the machinery.

The judgment should be reversed.*

BALTIMORE & OHIO RY. CO. v. BAUGH.

Supreme Court of the U. S., 1893. 149 U. S. 368.

John Baugh, defendant in error, was employed as a fireman on a locomotive of the plaintiff in error, and when so employed was injured, as is claimed, through the negligence of the engineer in charge thereof. He commenced a suit to recover for these injuries in the Circuit Court of the United States for the Southern District of Ohio. The circumstances of the injury were these: The locomotive was manned by one Hite, as engineer, and Baugh, as fireman, and was what is called in the testimony a "helper." On May 4th, 1885, it left Bellaire, Ohio, attached to a freight train, which it helped to the top of a grade about 20 miles west of that point. At the top of the grade the helper was detached, and returned alone to Bellaire. The rules of the company provided for two ways in which it could return; one, on the special orders of the train despatcher, and the other, by following some regular schedule train which must then carry signals to notify trains coming in the opposite directions that the helper was following it. On the day in question, without special orders and not following any schedule train, the helper started back for Bellaire, and on the way collided with a local train, and in the collision Baugh was injured.

No testimony was offered by the defendant, and at the close of the plaintiff's testimony it asked the court to direct a non-suit, which motion was overruled, to which ruling an exception was duly taken. In its charge to the jury the Court gave this instruction: "If the injury results from negligence or carelessness on the part of one so placed in authority over the employee of the company, who is injured, as to direct and control that employee then the company is liable." To which instruction an exception was duly taken. The jury returned a verdict for the plaintiff for \$6750 and upon this verdict judgment was entered, to reverse which the railroad company sued out a writ of error.

* The doctrine of this case has been rigidly applied in *New York, Ulrich v. R. R.*, 25 N. Y. App. Div. (1898) 465; *Massachusetts*, 172 Mass. 375 (1899); *New Jersey, Curley v. Hoff*, 62 N. J. L. 758 (1899); *Rhode Island, Hanna v. Granger*, 18 R. I. 507 (1894); *Larich v. Moies*, ib. 513; *Di Marcho v. Foundry*, ib. 514; *Maryland, Hamelin v. Malster*, 57 Md. 287 (1881); *Maine, Doughty v. Penobscot*, 76 Me. 143 (1884).

BREWER, J.:¹ The single question presented for our determination is, whether the engineer and fireman of this locomotive, running alone and without any train attached, were fellow-servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former.

Counsel for defendant in error rely principally upon the case of *Railroad Co. v. Ross*, 112 U. S. 377, taken in connection with this portion of Rule No. 10 of the company: "Whenever a train or engine is run without a conductor, the engineman thereof will also be regarded as conductor, and will act accordingly." The *Ross case*, as it is commonly known, decided that "a conductor of a railroad train, who has a right to command the movements of a train and control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow-servant to the engineer and other employees on the train." The argument is a short one: The conductor of a train represents the company, and is not a fellow-servant with his subordinates on the train. The rule of the company provides that when there is no conductor, the engineer shall be regarded as a conductor. Therefore, in such case he represents the company, and is likewise not a fellow-servant with his subordinates. But this gives a potency to the rule of the company which it does not possess. The inquiry must always be directed to the real powers and duties of the official and not simply to the name given to the office. The regulations of a company cannot make the conductor a fellow-servant with his subordinates, and thus overrule the law announced in the *Ross case*. Neither can it, by calling someone else a conductor, bring a case within the scope of the rule there laid down. In other words, the law is not shifted backwards and forwards by the mere regulation of the company, but applies generally, irrespectively of all such regulations. There is a principle underlying the decision in that case, and the question always is as to the applicability of that principle to the given state of facts.

What was the *Ross case*, and what was decided therein? The instruction given on the trial in the Circuit Court, which was made the principal ground of challenge, was in these words: "It is very clear, I think, that if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow-servants engaged in the same common employment, within the meaning of the rule of law of which I am speaking." The language of that instruction, it will be perceived, is very like that of the one here complained of, and if this court had approved that instruction as a general rule of law, it might well be said that that was sufficient authority for sustaining this and affirming the judgment. But though the question was fairly before the

¹ The opinion is much condensed, and all that part which holds that the relations between master and servant are of a general and not a local nature and that, therefore, the Federal Courts are not bound to follow the decisions, as to the liability of the one to the other, rendered in the State in which the relation exists and the accident occurred, is omitted. The opinion of Field, J., dissenting upon both points, is similarly abridged.

court, it did not attempt to approve the instruction generally, but simply held that it was not erroneous as applied to the facts of that case.

After stating the general rule, that a servant entering into service assumes the ordinary risks of such employment, and, among them, the risk of injuries caused through the negligence of a fellow-servant, and after referring to some cases on the general question, and saying that it was unnecessary to lay down any rule which would determine in all cases what is to be deemed a common employment, it turns to that which was recognized as the controlling fact in the case, to wit, the single and absolute control which the conductor has over the management of a train, as a separate branch of the company's business, and says (p. 390): "There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. . . . We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow-servant with the fireman, the brakeman, the porters, and the engineer. The latter are fellow-servants, in the running of the train under his direction; as to them and the train, he stands in the place of and represents the corporation."

The Court, therefore, did not hold that it was universally true that, when one servant has control over another, they cease to be fellow-servants within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was not erroneous when applied to the case of a conductor having exclusive control of a train in relation to other employees of the company acting under him on the same train. The conductor was, in the language of the opinion, "clothed with the control and management of a distinct department"; he was "a superintending officer", as described by Mr. Wharton; he had "the superintendence of a department", as suggested by the New York Court of Appeals.

And this rule is one frequently recognized. Indeed, where the master is a corporation, there can be no negligence on the part of the master except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation, the master, and his negligence as that of the master.

And it is only carrying the same principle a little further and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employees under them, vice-principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct. Thus, between the law department of a railway corporation and the operating department, there is a natural and distinct separation, one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So oftentimes there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master.² But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice-principal or representative of the master.³

² See also Brewer, J., in *Howard v. Railroad*, 26 Fed. Rep. 837 (1886), p. 643. "To make one as the controller of a department properly the representative of the master, his duties should be principally those of direction and control. He should have something more than the mere management of machinery; he should have subordinates over whose various actions he has supervision and control, and not a mere assistant to him in his working of machinery. He should have control over an entire department of service, and not simply of a single machine in that service." And see also McBride, J., in *Nall v. R. R.*, 129 Ind. 260 (1891), p. 270: "One who is placed in unrestricted control of a given department by his master, and is clothed with the power to command the services of other employees, not simply to see that they faithfully discharge the duties ordinarily pertaining to the employment, and in the usual places, with the usual appliances provided therefor, but has the authority to require of them the performance of other duties in other places, and with other appliances; who has authority to call the section men, the bridge builders, the freight handlers, and the laborers from the gravel pit and gravel trains, and require of all that they unite in averting the threatened destruction of a bridge, is certainly in such matters more than a mere fellow servant with those subject to his control."

³ "Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are nevertheless fellow workmen;" Peckham, J., *Northern Pacific R. R. v. Peterson*, 162 U. S. 346 (1896), p. 357. "The fact that one employee is more skillful than another, or has had greater experience, and is so deferred to by others does not change his relation to his employer or to his fellows. Nor does a difference in rank or grade of service change the rule. When the character of the business requires it, the master is as much bound

The truth is, the various employees of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters and not of fellow-servants, and only those on the same steps fellow-servants, because not subject to any control by one over the other. *Prima facie*, all who enter into the employ of a single master are engaged in a common service, and are fellow-servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow-servants. All enter into the service of the same master, to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employees, and that risk, which he knows exists, he assumes in entering into the employment. Thus, in the opinion in the *Ross case*, p. 382, it was said: "Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them he cannot recover compensation from his employer. The obvious reason for this exemption is, that he has, or, in law, is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid."

But the danger from the negligence of one specially in charge of the particular work is, as obvious and as great as from that of those who are simply co-workers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employee, it includes all co-workers to the same end, whether in control or not.⁴

to provide his workmen with a reasonably competent foreman as to provide them with tools, but in either case his liability ceases when he has made a suitable selection. What remains to be done is that each workman, whatever his rank or skill or experience, shall, with reasonable diligence and intelligence, discharge his duty towards his employer and his fellows;" Williams, J., *Ross v. Walker*, 139 Pa. 42 (1891), p. 49.

"Where groups or gangs of men are employed in the performance of work, it is, in the nature of things, impossible to bend their energies to the accomplishment of the ultimate purpose without intelligent direction upon the part of one mind. To secure this end and in many circumstances to protect the men themselves, they must work under a foreman. His work, although it consists in giving directions, is not only essential, but, as his commands set in motion forces which may lead to the injury or death of those under him, there is an especial reason why the employees should consider the intelligence and prudence of the man in control. If there is any philosophy in the general rule, its purpose must be clearest in the case of co-service of this character, since the workmen have ordinarily a better opportunity than the master to determine how much of discretion the foreman possesses. These considerations, and especially the want of opportunity upon the part of the master to supervise every command should prompt courts to exculpate him where there has been no negligence in the perform-

But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master.

It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow-servants, and puts an end to the master's liability. On the contrary, all the cases proceed on the ground of some breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employee assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a co-worker. That the running of an engine by itself is not a separate branch of service, seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department, the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment and are fellow-servants. It might as well be said that, where a liveryman has a dozen carriages, the driver of each has charge of a separate branch or department of service, and that if one drives his carriage negligently against another employee the master is exempt from liability.

Reversed and the case remanded for a new trial.⁵

Mr. Justice FIELD dissenting.

ance of a master's duty, as in negligently hiring or retaining an unfit foreman;" Gillett, J., *Dill v. Marmon*, 164 Ind. 507 (1905), p. 519.

⁵In *New England Railroad Co. v. Conroy*, 175 U. S. 323 (1899), *Chicago etc., R. R. v. Ross*, 112 U. S. 377 (1884), was definitely overruled upon the very point decided, Shiras, J., saying, p. 341: "We think it went too far in holding that a conductor of a freight train is, *ipso facto*, a vice-principal of the company. An inspection of the opinion shows that that conclusion was based upon certain assumptions, not borne out by the evidence in the case, as to the powers and duties of conductors of freight trains."

Until the decision in the principal case Ross' case had been understood as going at least to the extent of making an employee a vice-principal of his employer, where the latter had entrusted to him the direction of any part of his business and had for that purpose given him control over inferior servants who were required to obey his orders, and where such employee, being either permanently or temporarily out of reach of any superior to whom he

BLOYD v. RAILWAY CO.

Supreme Court of Arkansas, 1893. 58 Ark. 66.

MANSFIELD, J., in *Bloyd v. Railway Co.*, 58 Ark. 66 (1893), p. 71: A servant engaged with a squad of men in constructing a trestle was ordered by one Munden, who was in charge of the work, to unload a certain car; at about the same time Munden ordered the train crew to move forward, so injuring the plaintiff, who, in obedience to the order to unload the car, was upon the trestle. In a general sense the work on trestles was done under the supervision of one Bradley, who was the defendants' superintendent of bridges, but it appeared Bradley had never supervised this particular piece of work and the gang looked for directions exclusively to Munden, who performed no material labor, but whose sole business it was to direct and oversee the work.

In some of the adjudged cases the distinction between the relations indicated by the words foreman and vice-principal is apparently made to depend more upon the extent or magnitude, than upon the nature, of the work of which the offending servant has charge.

Other courts, proceeding upon what we think a sounder principle, have attached no importance to the extent of the work, but have considered only whether it was such as required a skillful or careful supervision; and where such supervision was necessary to the safety of the laborers engaged upon the work, they have held it was the master's duty to bestow it, and that if he appointed an agent to perform that duty he was responsible for his negligence.¹

It was not the rank or title of the manager which made the company present in his person, but the authority with which he was clothed, and the duty of supervision he undertook to perform; and if an officer or agent of inferior grade had been, for the time, invested with the same power, and had undertaken to perform the same duty, the company would, we think, have been equally liable for his negligence.²

could look for directions, was forced to rely upon his own judgment as to the manner in which the work was to be done; and, as so understood, was followed not only by the inferior Federal Courts but by the Courts of last resort in several States; as *Virginia, Moon v. R. R.*, 78 Va. 745 (1884); *Torrian v. R. R.*, 84 Va. 192 (1887), and *West Virginia, Madden v. R. R.*, 28 W. Va. 610 (1886); *Daniel v. R. R.*, 36 W. Va. 397 (1892). Upon the decision of the principal case these jurisdictions adopted the law as there announced, overruling their earlier decisions, *Norfolk, etc., R. R. v. Houchins*, 95 Va. 398 (1897); *Jackson v. R. R.*, 43 W. Va. 380 (1897).

¹So in *Taylor v. R. R.*, 121 Ind. 124 (1889), it was held that a company was liable where a master mechanic, who was held to be so far in full control as to be properly regarded as a vice-principal, by his own acts, made unsafe the execution of a command which he had given the plaintiff.

²*Accord: Lewis v. Seifert*, 116 Pa. 628 (1887), where the defendant company was held liable for the negligence of an assistant, who during the train despatcher's absence, was authorized to take his place.

DARRIGAN v. NEW YORK AND NEW ENGLAND
RAILROAD COMPANY.

Supreme Court of Errors of Connecticut, 1885. 52 Conn. 285.

CARPENTER, J.: On December 14th, 1882, there were two special or irregular trains going in opposite directions on the western division of the defendant's single track railroad. These trains were run as directed by telegrams from the train-dispatcher in the division superintendent's office at Hartford. The train going east was a construction train. About twelve o'clock it was at Southford station, where it received an order from the train-dispatcher to "run to Towantic as a special train ahead of No. 6, and then work between Towantic and Waterbury as a special train until six o'clock P. M., and protect themselves with flags against Goble special east after 1.30 P. M." The above order was given by the chief train-dispatcher. Soon after he was relieved in the regular course of business by an assistant. A little before five o'clock the same afternoon, the plaintiff's train going west received at Waterbury from the assistant train-dispatcher an order to run to Brewster's as a special. In obeying this order the two trains collided and the plaintiff was seriously injured. The court below rendered judgment for the plaintiff, and the defendant appealed.

The negligence of the train-dispatcher is admitted, but the defendant claimed that such negligence was the negligence of a fellow-servant, for which it is not liable; and that is the first question presented for our consideration.

In that case (*Holden v. Fitchburg R. R.*, 129 Mass. 268), GRAY, C. J., says: "If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures and engines in carrying on the master's work." In another place he adds: "And it makes no difference that the servant whose negligence causes the injury is a sub-manager or foreman of higher grade or greater authority than the plaintiff."

In *Feltham v. England*, L. R., 2 Q. B., 33, it is said that the rule of exemption is not altered by the fact that the servant guilty of negligence is a servant of superior authority whose lawful directions the other is bound to obey. In *Wilson v. Merry*, L. R., 1 H. L., Scotch Appeals, 326, the Lord Chancellor says: "But what the master is, in my opinion, bound to his servants to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do."

It seems to us that the rule prevailing in Massachusetts, and which did prevail in England previous to the passage of the "Employers' Liability Act," hereinafter referred to, unduly enlarges the exemption and confines the liability of employers within too narrow limits.

The rule we think does not sufficiently recognize the distinction between agents, managers, and even superintendents, on the one hand, and mere servants and common laborers on the other; between duties which the master is required to perform and work which is ordinarily performed by employees. It makes little allowance for emergencies, and does not sufficiently regard the obvious fact that cases are constantly arising, especially in the operation of railroads, which no general rule can provide for, in which the master must be regarded as constructively present, and in which some one must be invested with a discretion and a right to speak and command in his name and by his authority. Such a right carries with it the corresponding duty of obedience—someone must hear and obey. To make no discrimination, but in all cases to place those who are invested with authority to direct and control on the same footing with those whose duty it is merely to perform as directed without discretion and without responsibility, seems to us unwise and impolitic.

The duties of a master in most cases are easily distinguished from those of an employee. The proprietor of a cotton mill is bound to have a safe building, a safe dam or engine, and safe machinery; and he is bound to keep them so. To do that he must employ skilled mechanics, who perform his duties. Their negligence is his negligence. The English rule says that he has done his whole duty when he has employed skillful, careful men to do this work. We think that a more salutary rule would be to require him to see that the work is actually done with care and skill; to require him to inspect the work personally if competent, and if not, to employ others who are, and who will exercise more than ordinary care, so as to make it reasonably certain that the operatives will be surrounded by safe machinery and appliances. The liability of the master for the negligence of such agents is a surer guarantee of safety than immunity.

The diligence required will be the greater as the danger and hazards increase. The operation of a railroad requires a greater degree of care than the operation of a cotton mill. It is the duty of a railroad corporation to prepare a time table and adjust the running of its trains so as to avoid collisions. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. That cannot be done by general rules. Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them—a train-dispatcher, acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and the duty of a locomotive engineer? The duty of the former pertains to management and direction, that of the latter to obedience. It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate

ate all distinctions among those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all duty and all liability to those in its service.

A reference to the rules of the company in connection with the facts will serve to show that the views above expressed are applicable to this case. Here were two irregular trains to be moved in opposite directions on a single track railroad so as to pass each other. It was necessary that their movements should be directed by instructions emanating from some one intelligent source. The rules of the company provide for moving trains by special orders. One rule is, "All orders shall be given by a superintendent, or by a dispatcher appointed for that purpose, under directions of a superintendent; no other person will be allowed to give them." Another rule is, "Division superintendents are supreme on their respective divisions, and are responsible only to the management for such orders as they may give." The following is from the finding of the court: "So far as the printed rules and regulations of the company did not govern, the train-dispatcher was authorized to give such orders for the movement and protection of trains as he saw fit, and while so acting he had all the authority of, and acted in the stead and place of, the division superintendent."

The train-dispatcher then, in respect to the matter of moving these trains was supreme. The whole power of the corporation whose duty it was to move them safely, was delegated to him. He was the agent through whom the corporation attempted to perform its duty. He acted in its name, by its authority, and in its stead. The engineer was bound to obey his order. Disobedience or deviation would have been subversive of order and discipline, destructive in its consequences, and just cause for immediate dismissal. He received an order to go west from Waterbury on a single track road at a time when another train was approaching Waterbury from the west. The order was imperative and it required of him implicit obedience. He obeyed. He did not then know the consequences, but the company did or should have known. He conformed to the order as he was bound to; and while so conforming, and as the direct consequence thereof, he was injured. Reason, justice and law require that the company should be held responsible.

Another rule provides that "in emergencies each employee must promptly obey the orders of any superior officer." By that rule the company made the order of that officer, whoever he may be, and of whatever grade he may be, its own. If the order is an improper one, and, in executing it, another employee is injured, the company should be responsible. In such a case the grade of service becomes and is material.

That rule, too, in its spirit had an application to the case. There was something in the nature of an emergency. There was no room for divided counsels; there must be unity of purpose and one mind must control. That power and duty devolved upon the train-dispatcher.

It is worthy of notice that the principles which we think should

govern this case have been embodied in an act of Parliament and are now the law of England. The decisions of her courts on this question have been overruled by statute. In 1880 the "Employers' Liability Act" was passed, the first section of which is as follows:

"When, after the commencement of this act, personal injury is caused to a workman—(1) by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer; or (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the service of such superintendence; or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, when such injury resulted from his having so conformed; or (4) by reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer; or (5) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway;—the workman, or, in case the injury results in death, the legal personal representative of the workman, and any person entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work." The act limits the amount to be recovered in certain cases; and will cease to be operative at the end of seven years unless re-enacted.¹

¹ *Accord: Railroad v. Barry*, 58 Ark. 198 (1893); *Louisville, etc., R. R. v. Heck*, 151 Ind. 292 (1898); *Smith v. R. R.*, 92 Mo. 359 (1887); *Sheehan v. R. R.*, 91 N. Y. 332 (1883), p. 337; *Hankins v. R. R.*, 142 N. Y. 416 (1894); *Lewis v. Seifert*, 116 Pa. 628 (1887); *Brommer v. R. R.*, 205 Pa. 432 (1903); and this though the delinquent employee is not the regular or chief train despatcher, but a subordinate filling his post during his absence; *Lewis v. Seifert, supra*. The company is liable, not only for a negligent erroneous order, but also for the despatcher's non-feasance in failing to send orders when the necessity therefor would be apparent to a reasonably prudent despatcher; *Santa Fe, etc., R. R. v. Holmes*, 202 U. S. 436 (1906).

The weight of authority is in favor of the view that a station agent in transmitting the orders of the train despatcher to the crews of the trains whose movements are to be thereby regulated is acting as a fellow servant merely, and the company is not liable for his inaccurate transmission or for a failure to transmit at all, or in setting the warning signals required by such running orders; *Slater v. Jewett*, 85 N. Y. 61 (1881); *Oregon Short Line v. Frost*, 74 Fed. 965 (C. C. A. 9th Circ., 1900); *Dealey v. R. R.*, 4 Atl. 170 (Pa., 1886); *Cincinnati, etc., R. R. v. Clark*, 57 Fed. 125 (C. C. A. 6th Circ., 1893); and *Baltimore & Ohio R. R. v. Camp*, 65 Fed. 952 (C. C. A. 6th Circ., 1895), in which the cases on both sides are cited by Taft, J.: *Monaghan v. R. R.*, 45 Hun (N. Y.), 113 (1887), seems to carry beyond its proper limits the view that a telegraph operator is a fellow servant of the crews of the train to which he gives orders—since, owing to a temporary disarrangement of its system pending certain alterations, the operator himself issued the running orders and did not merely transmit those of a train despatcher; cf. *Lewis v. Seifert, ante*.

Dana v. R. R., 92 N. Y. 639 (1883), said by White, J., *diss.*, in *Northern Pacific R. R. v. Dixon*, *infra*, to be *contra*, is explained in *Sutherland v. R. R.*, 26 N. E. 609 (N. Y., 1891), as having been decided on the ground that, upon

CHAMPLIN, J., in *Hunn v. Michigan Central R. R.*, 78 Mich. 513 (1889):¹

Perhaps no satisfactory rule has yet been formulated by which it may in all cases be determined who are fellow-servants, in such sense as to shield the master for the negligence of his servant. We may start, however, where the rule is clear that a master is liable to his servant for an injury caused by his own negligence. The master may not choose to give his personal attention to his business, and may desire to put another in his place, to manage and control it for him as fully as he might do if personally present. Such person is his *alter ego*, and the master is as responsible for his acts of omission and commission, while engaged in the business entrusted to him, as if he did such acts himself. It is the duty of the master to supervise, direct, and control the operations and management of his business, so that no injury shall ensue to his employes, through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations, who can only act through natural persons. Whenever the business conducted by the person selected by the master is such that the person selected is invested with full control (subject to no one's supervision except the master's) over the action of the employees engaged in carrying on a particular branch of the master's business, and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his providence to direct, and the duty of the employees to obey, then he stands in the place of the master, and is not a fellow-servant with those whom he controls.²

MAINE & NEW HAMPSHIRE GRANITE CO v. HACHEY.

Circuit Court of Appeals, First Circuit, 1909. 173 Fed. 784.

BROWN, District Judge: This is a writ of error for review of the rulings of the Circuit Court in an action for negligence. Upon

the evidence, the jury might have found that the system provided for the transmission of orders was insufficient.

While a railroad company is bound to establish a system, adequate if properly carried out, for reporting the movements of its trains to its train dispatchers, so that they may intelligently issue such special orders as may be necessary, it is not liable for the failure of an employee to properly carry out such system, as where a telegraph operator neglects to send to the dispatcher notice of the passing of a train, though as a result a train dispatcher, by reason of his lack of information, issues a fatally dangerous order. *Northern Pacific R. R. v. Dixon*, 194 U. S. 338 (1903); *Ill. Cent. R. R. v. Bentz*, 99 Fed. 657 (C. C. A. 6th Circ., 1900).

¹ The question presented in the facts was whether the defendant company was liable for the negligence of a train dispatcher who has sent orders to two trains which necessitated their meeting on the same track, and had notified the crew of only one of the two trains, entirely failing to notify or give proper directions to that of the other.

² See *Wilson v. Merry*, ante p. 381, and *Albro v. Agawam*, 6 Cush. (60 Mass.) 75 (1850), where the servant was injured by the improper method of conducting the defendant's business, adopted and directed by the superintendent, who had full control thereof.

the conclusion of the plaintiff's testimony the Granite Corporation moved for the direction of a verdict in its favor, and upon a denial of this motion duly excepted. Its exception raises the question whether, upon the facts, the negligence which resulted in personal injuries was that of a fellow servant or of the master, the Granite Corporation.

Hachey was employed by the Granite Corporation in its quarry at Redstone, N. H. He was engaged in breaking up waste rock, or "grout," beside a large pile of grout about 30 feet in height. Pieces of waste rock were deposited upon this grout pile from time to time by a derrick. The danger from falling stone was such as to require that the men working at or near the grout pile should receive a warning whenever rock was to be dropped from the derrick upon the slanting grout pile.

The derrick was operated by machinery, and was in charge of a boss derrickman, whose duty it was to see that the stones were properly raised, swung, and deposited upon the grout pile, to give proper signals to the engineer, and also to give warning to the workmen in the vicinity of the grout pile in time to enable them to go to a place of safety while stones were dropped upon the pile. The boss derrickman usually had one or two men under him as helpers.

It is agreed that it was the duty of the boss derrickman to give timely warnings, either personally or by sending one of his helpers to do it. The warning was given by shouting, or at times by rolling a small stone near the men at the foot of the pile. The men working at or near the grout pile were accustomed to rely upon receiving a signal before the dumping of rock. The pile of grout obstructed the view of the derrick, and the attention of the men at work breaking up rock was so engaged that the giving of signals to them was required as a regular accompaniment of the operation of the derrick. It is agreed that it was customary for the derrickman to give the signals personally or through one of his helpers.

Upon the present record it must be assumed that the boss derrickman, Bessanti, was guilty of negligence in dropping a heavy stone on the grout pile without giving warning. The stone slid and fell upon Hachey, inflicting serious injury. Hachey was without fault in the matter.

The Granite Corporation, plaintiff in error, conceding the negligence of Bessanti, the boss derrickman, contends that his failure to give warning of the movement of the derrick and of the dropping of stone was a negligent performance of the duties of a fellow-servant of Hachey. The defendant in error contends that under the circumstances the master, in order to make the place at the side of the grout pile a reasonably safe working place, was bound to give warning, and that the person employed to give warning was performing a part of the master's nondelegable duty.

In support of the contention that in respect to the duty of giving warning of the dropping of stone the boss derrickman was not a fellow servant, but a representative of the master, the defendant in error suggests a distinction between the failure to observe a rule necessary in maintaining a safe place and the failure to observe

a rule promulgated for the successful operation of the work. It is argued that the giving of a warning signal was not a work of operation, and that it was distinct from the duty of handling the rock. Such a division of the duties of the boss derrickman into two parts—that is, the operation of the derrick and moving of rock, wherein he would be a fellow servant, and that of giving warning, wherein he would not be a fellow servant—is not sound.¹ Those cases which, in general terms, state it to be the master's duty to give warning to inexperienced servants or of special dangers are not applicable to the facts of the present case, though they may furnish some general phrases which seem to give support to the argument of the defendant in error. The general proposition that it is the duty of the master to give warning is not to be so extended as to require him to give in person or to insure the giving by others of all those special signals or shouts which are so associated with the work of operation as to become part of it. The employment of different men in different parts of the general work requires under many circumstances the giving of signals as an accompaniment of the work itself, in order that there may be co-operation in the movement of the men.² The giving of such signals is a part of the work of operation. Such signals are rather the giving of information of what one workman is about to do, in order that his fellow workmen may have knowledge of it and conduct themselves accordingly, than the giving of orders which are to be considered as the orders of a master. *Standard Oil Company v. Anderson*, 212 U. S. 216-226, 29 Sup. Ct. 252, 53, L. Ed. —. The master may intrust to a competent servant the work of shouting or otherwise signaling when he is about to hoist or to lower away, and it is not the master's fault if such a servant fails to inform his fellow servants of the movement of the machine under his charge.

The evidence does not show any failure of the master to make reasonable provision that proper signals should be given. The uninterrupted custom of the work at the quarry shows that there was no defect in the system established by the master. The authorities do not support the contention that the master is an insurer of the sufficiency of the means that he selects for giving signals. There can be little doubt that the boss derrickman, who controls the movements of the derrick by signaling the engineer, is a suitable, if not the most suitable, person to intrust with the duty of giving warning

¹ See, however, *Belleville Co. v. Mooney*, 61 N. J. L. 253 (1897), pp. 254-255, *contra*.

² So, where the usual operations of other servants necessarily tend, from time to time, to imperil a servant, who from the nature of his work must give it his entire attention, the master must adopt a system and promulgate rules which, if observed, will secure to the servant timely warning and so enable him to avoid injury. *Smith v. Baker*, L. R. 1891, A. C. 325; *Polaski v. Pittsburgh Coal Co.*, 134 Wis. 259 (1908), and see *Labatt, Master and Servant*, §209 and notes. When the necessity of warning is urgent, the master does not adequately perform his duty in this respect by committing the task of giving it to a servant who has other duties to perform likely to divert his attention; *The Pioneer*, 78 Fed. 600 (Dist. Ct. 1897); *Western Electric Co. v. Hanselmann*, 136 Fed. 564 (C. C. A. 2nd Circ., 1905).

of the proposed movements of the derrick. By the course of business, with which Hachey by many years of experience had become familiar, the duties of operating the derrick and of giving notice of its operations were related and associated duties intrusted to a fellow workman. Reasonable provision for giving warning having been made, the danger that this workman might be negligent in a single instance in the performance of his duty was a risk assumed by Hachey.

It being conceded that it was the general duty of the boss derrickman both to operate the derrick and to give signals of its operation, the fact that shortly before the accident the general superintendent of the quarry gave him special instructions to look out for the men behind the grout pile did not change his status as a fellow servant or enlarge the master's liability for his failure of duty. The authorities cited by the plaintiff in error amply sustain its contention that the negligence of Bessanti was of a fellow servant, and not the negligence of the master. Among them are *Alaska, etc., Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; *McLaine v. Head & Dowst*, 71 N. H. 294, 52 Atl. 545, 58 L. R. A. 462, 93 Am. St. Rep. 522; *Northern Pacific R. R. Co. v. Charles*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; *Martin v. Railroad Co.*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; *Hermann v. Mill Co.* (D. C.) 71 Fed. 853; *Fortin v. Manville Co.* (C. C.), 128 Fed. 642. See, also, *Kreigh v. Westinghouse & Co.*, 214 U. S. 249-256, 29 Sup. Ct. 619, 53 L. Ed. —; *Perry v. Rogers*, 157 N. Y. 251-255, 51 N. E. 1021 *et seq.*; 26 Cyc. 1338.³

The judgment of the Circuit Court is reversed, with costs of appeal to the plaintiff in error.

MOORE v. DUBLIN COTTON MILLS.

Supreme Court of Georgia, 1906. 127 Georgia Reports, 609.

COBB, P. J. (After stating the facts): The petition alleged that N. S. West was the vice-principal of the defendant, and the defendant contends that the evidence introduced failed to establish this allegation, and that, under the evidence, West was only a fellow servant, and hence the defendant was not liable to the plaintiff for his negli-

³ *Accord: Coleman v. Keenan*, 223 Pa. 29 (1909), no notice of blast; *Ocean S. S. Co. v. Cheeney*, 86 Ga. 278 (1890); *Portance v. Lehigh Valley Co.*, 101 Wisc. 574 (1899); *Hussey v. Coger*, 112 N. Y. 614 (1889), cargo lowered into hold of vessel without warning; *Martin v. R. R.*, 166 U. S. 399 (1896), p. 403, foreman gave no notice to crew of hand car of approaching train; *Lundquist v. Duluth Ry.*, 65 Minn. 387 (1896); *Coyle v. P. R. T.*, 17 D. R. (Pa., C. P. Phila. Co., per von Moschzisker, J., 1908) 180, no warning given to men repairing tracks of approach of street cars. There are, however, decisions directly opposed to each of these; *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253 (1897), blasting; *Anderson v. Pittsburg Coal Co.*, 122 N. W. 794 (Minn., 1909), loading cargo; *D'Agostino v. Ry. Co.*, 72 N. J. L. 358 (1905), workmen repairing street railway tracks; *Promer v. R. R.*, 90 Wis. 215 (1895); *Hunter v. North Iowa Brick and Tile Co.*, 136 N. W. 515 (Iowa, 1912), machine, run by engine in another room, started without any warning. See also *Inland Steel Co. v. Smith*, 39 Ind. App. 636 (1905), 168 Ind. 245 (1907), traveling crane run without warning upon an employee while at work, and cases cited in *Anderson v. Coal Company*, *supra*.

gence. The case absolutely turns on this question; for, as to the other allegations of the petition, the evidence of the plaintiff is sufficient to establish them as they are therein laid.

The question at last, in each case, is whether the person charged as vice-principal was performing towards the injured servant a duty which the master owed to that servant and which the servant had a right to expect would be discharged by the master, and which the master could not avoid or shirk by placing the responsibility upon another person. He (the master) is likewise bound to make rules and regulations for the conduct of his business, so that the machinery and appliances therein may be so operated as to promote the safety of his servants. He may formulate and promulgate rules to be followed by his servants in the conduct of his business, by placing the same in their hands; or he may authorize one of his servants to give direction as to the manner in which machines and other appliances of a dangerous nature shall be operated. In doing this he imposes upon this servant the duty which the law imposes upon him, and the servant so authorized stands in the place of the master, and is his representative, so far as other servants are concerned, as to any general rule that may be promulgated by him, or specific direction in a given instance. The rule-book of a railway company, in which are contained the regulations to be followed by engineers, conductors, flagmen, and others engaged in the operation of trains, is a familiar instance, where rules are promulgated in writing and placed in the hands of each employee. The general authority given to a train-dispatcher to control the movement of trains, with reference to any emergency that might arise, is an illustration of where the power to make a rule applicable to a single instance can be exercised. In such case the train-dispatcher stands in the shoes of the railroad company, and the order of the train-dispatcher is the order of the company. *Pittsburg Ry Co. v. Henderson* (Ohio), 5 Am. & Eng. R. Cas. 529.

Of course, it is not the master's duty to provide specific rules for every detail in the operation of his business; and one may be in a position where his giving orders in reference to the master's business would, on account of their character, not be orders emanating from the master. But whenever the order is of a grave nature relating to the operation of dangerous machinery, and is a general order to be followed under all circumstances, and not merely casual or in reference to a mere matter of trivial detail, amounting merely to an act of supervision only, the order must be construed as the order of the master, and not the order of a mere fellow-servant. When a servant seeks to hold a master liable on account of his having obeyed an order given by another servant, it is incumbent on him to show, not only that the order was given and obeyed, but that the order was of such character as that the instruction in reference thereto must, from the nature of things, have emanated from the master, and that the servant who gave it was authorized by the master to give the order in the particular case, or that the scope of his employment was such that his authority extended to giving general orders of that character.

In the present case there was evidence that N. S. West was superintendent over the hands of the Dublin Cotton Mills, and that he was the overseer. This alone was not sufficient to show that he was the vice-principal. The evidence showed further that he had charge of the work and the hands, and that the plaintiff was working under his orders. This alone, without evidence as to what occurred or what brought about the injury, would probably not be sufficient to show that West was the vice-principal. It would depend altogether upon the character of the order. In other words, before the servant would take rank as a vice-principal of the master, it must appear that he is vested with authority to give those orders which the servant of a master is entitled to regard as coming from the master himself. Orders in reference to mere matters of trivial detail amounting merely to supervision in the operation of the business may be properly entrusted to a servant,¹ if the master has been free from negligence in the employment of the servant to whom he entrusts this duty; that is, many orders in the operation of a business are part of the mere supervision of the work. But when there is an order in reference to the mode and manner in which the work of the master shall be performed, and this work consists in the use of or work about a dangerous machine, it is to be treated as the command of his master, when emanating from one representing the master, although it may come through the mouth of a person who, under other circumstances, is merely a co-laborer.

The duty of the plaintiff was to clean the machine at stated times. This work could be done either with the machine running or with it stopped. There was a latent danger to be encountered when the work was done with the machine running. The plaintiff, according to the testimony, did not know of this latent danger. The evidence authorized a finding that the master either knew of it, or could have known of it by the exercise of ordinary diligence. As the evidence shows that the superintendent ordered the plaintiff, in positive terms, to clean the machine while it was running, it was for a jury to determine whether he was in the performance of an act which was a part of the mode and manner of the master's business, and whether the command of the superintendent was, under all the circumstances, the command of the master. Whether the danger in the performance of the act in the manner directed by the superintendent was not so obvious to the plaintiff that he was guilty of negligence in obeying the command was also a question for the jury. It must be kept in mind that the order involved in this case was not a mere direction for one occasion only, but it was a rule laid down for observance by the servant to be followed at stated intervals,

¹"Giving commands as to the proper manner of performing work is not ordinarily one of those absolute personal functions which the master alone can exercise." Gillett, J., *Dill v. Marmon*, 164 Ind. 507 (1905), p. 521. "A command is a transitory act which the employer has no chance to supervise. It is not a permanent condition of land or machinery, or the abiding incompetence of an employee." Holmes, J., *Halleck v. Deering*, 161 Mass. 469 (1894), p. 471. "The master does not insure his employees against each other, nor is he bound to supervise and direct every detail of their labor." Williams, J., *Ross v. Walker*, 139 Pa. 42 (1891), p. 49.

and was of such nature that the plaintiff, from all the circumstances, had the right to presume that in the superintendent's order he heard the voice of the master. He not only heard the voice of the master, but he heard it speaking in reference to a matter which should be controlled by his voice. The evidence proved the allegations of the petition substantially as laid, and it was error to grant a nonsuit.

Judgement reversed.²

CHICAGO & ALTON R. R. CO. v. CAROLINE MAY, ADMX.

Supreme Court of Illinois, 1884. 108 Ill. 288.

MULKEY, J.: May, the plaintiff decedent, was engaged, in the course of his employment in the service of the defendants, as one of a gang of men in removing, under the direction and control of one Fricke, the defendant's foreman of its lumber yard, lumber from the yard to the car shops. The lumber, consisting of a pile of heavy oak planks, some sixteen feet in length, had already been placed on a small light car called a "rubble-car,"—both the car and lumber were covered with sleet. A large box car stood on the track and had to be moved before the lumber could be moved. To do this it was necessary to push both cars back some distance to a point beyond the switch. For this purpose Fricke ordered the men to push the box car against the "rubble-car," which "shoved" the lumber so far off the car that it would have fallen had not the bumpers of the box car held it up. Having pushed both cars in this way past the switch, Fricke ordered the men to leave the small car and push the box car out of the way. Two of the men went to the rear of the "rubble-car" to hold the lumber while the others started to push the box car, and, as soon as they were far enough apart, some of them, including May, went in between the two to push with more effect. Fricke then called the two men, who were holding the lumber in the "rubble-car," to come and help push. They warned him that the lumber would fall, but he repeated the order, saying, "Let the lumber go to the devil." The order was obeyed, the lumber fell to the ground, tilting up the end of the "rubble-car," and driving it forward against the end of the box car and catching May, who had no time

² In both *Bloyd v. Railway, ante*, and *Augusta v. Owens*, 11 Ga. 464 (1900), the fact is emphasized that the negligence was that of an employee who himself took no part in the manual labor of the workmen, but whose sole function was to direct and control those engaged in the actual labor.

But see *Peckham, J., N. P. R. R. v. Peterson*, 162 U. S. 346 (1906), p. 357. "The mere fact that he (the negligent foreman) did not actually handle a shovel or pick is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are, nevertheless, fellow servants."

That a person directing a piece of work has the power to discharge and employ those who do the work is not as a rule regarded as of itself making him a "vice-principal"; see *Staebler v. Warren-Ehret Co.*, 223 Pa. 129 (1909).

to escape, between the "rubble-car" and the bumpers of the box car, thereby inflicting the injuries of which he subsequently died.¹

The instruction claimed to be most objectionable, and the only one specially noticed in appellant's brief in this court is as follows:

"2. That one servant of a corporation to whom the corporation delegates the power of hiring and of discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may be ordinarily required to do, is, as to such servants whom he so hires, discharges and controls, the representative of the master, and is not a fellow-servant, and is not, under such facts, if proven by the evidence, in the same line of employment as the servants whom he so controls."

The rule on the subject, as we understand it, is this: The mere fact that one of a number of servants who are in the habit of working together in the same line of employment, for a common master, has power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. On the other hand, the mere fact that the servant exercising such authority, sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case, in this respect, must depend upon its own circumstances. If the negligence complained of consists of some act done or omitted by one having such authority, which relates to his duties as a co-laborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable. For instance, if the section boss of a railway company, while working with his squad of men on the company's road, should negligently strike or otherwise injure one of them, causing his death, the company would not be liable; but when the negligent act complained of arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. In such case he is not the fellow-servant of those under his charge, with respect to the exercise of such power, for no one but himself, in the case supposed, is clothed with authority to command the others.

When a railway company confers authority upon one of its employees to take charge and control of a gang of men in carrying on some particular branch of its business, such employee, in governing and directing the movement of the men under his charge with respect to that branch of its business, is the direct representative of the company itself, and all commands given by him within the scope of his authority are, in law, the commands of the company, and the fact that he may have an immediate superior standing between him

¹The facts as given are condensed from those given in the opinion. Sheldon, C. J., Scott and Craig, JJ., dissent in an opinion which is omitted.

and the company makes no difference in this respect. In exercising this power he does not stand upon the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations, and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences. These views are in strict accord with all that is said in the *Moranda* case, to which such frequent references have been made. It is believed, moreover, that the test here suggested, and recognized in many of the cases, will reconcile many of the apparently conflicting decisions of the courts of this country which have declined to follow the English rule on this subject, and the principle, though not formally announced heretofore, is the logical result of our own adjudications.

Testing the present case by the rule here announced, the company is clearly liable, for it is manifest that May's death was the direct result of an improper and inconsiderate order that no one exercising ordinary skill or prudence would have given. It was not a mere careless act done by him in performing his work as a co-laborer or fellow-servant, but it was a negligent and unskillful exercise of his power and authority over the men in his charge, for which, as we have already seen, the company must be held to answer. In support of the general views here expressed we cite the following authorities: *Buckner v. New York Central Ry. Co.*, 2 Lansing, 506 (49 N. Y. 672); *Chicago, Burlington & Quincy R. R. Co. v. McLallen*, 84 Ill. 116; *Lalor v. Chicago, Burlington & Quincy R. R. Co.*, 52 id. 401; *Mullen v. P. & S. M. Steamship Co.*, 78 Pa. St. 25; *Gormly v. Vulcan Iron Works*, 61 Mo. 492.

The judgment of the Appellate Court, we think, for the reasons stated, is right, and it is therefore affirmed.

Judgment affirmed.²

² *Accord: Kansas, Walker v. Gillett*, 59 Kans. 214 (1898); *Consolidated Kansas City, etc., Co. v. Peterson*, 8 Kans. App. 316 (1899); *Louisiana, Dobson v. Ry. Co.*, 52 La. Ann. (Part. II) 1167 (1900); *Missouri, Dowling v. Allen*, 74 Mo. 13 (1881); *Foster v. R. R.*, 115 Mo. 165 (1892); *Burkard v. Rope Co.*, 217 Mo. 466, distinguishing *Grattis v. R. R. Co.*, 153 Mo. 380 (1900), apparently *contra: Nebraska R. R. v. Finlayson*, 16 Neb. 578 (1884); *Sioux City, Etc., Ry. Co. v. Smith*, 22 Neb. 775 (1888); *Ohio, Cleveland, Etc., R. R. v. Keary*, 3 Ohio St. 201 (1854); *Berea Stone Co. v. Kraft*, 31 Ohio St. 287 (1877); *Tennessee, Ill. Cent. R. R. v. Spence*, 73 Tenn. 173 (1893); *Chattanooga R. R. v. Lawson*, 101 Tenn. 406 (1898); *Gann v. R. R.*, *ib.* 380; *Utah, Armstrong v. R. R.*, 8 Utah, 420 (1893). In Kentucky the master is liable to an inferior servant for the gross, but not the ordinary, negligence of a superior servant. *Louisville, etc., R. R., v. Collins*, 2 Duv. 114 (1865); as to what is held to be gross negligence in the management of a railroad train, see *Greer v. R. R.*, 94 Ky. 169 (1893), and *Chattanooga, Etc., R. R. v. Palmer*, 98 Ky. 382 (1895).

The master, however, is not liable to all inferior servants for the negligence of those of a higher grade, but only to such as are under the direction and control of the delinquent. *Pittsburgh, Etc., R. R. v. Devinney*, 17 Ohio St. 187 (1867); *East Tenn., Etc., R. R. v. Rush*, 15 Lea (Tenn.) 145 (1885).

There is much difference of opinion in the above jurisdictions as to whether the master is liable for all misconduct which a superior servant

RICKS v. FLYNN.

Supreme Court of Pennsylvania, 1900, 196 Pa. 263.

MESTREZAT, J.: The question raised by this record requires us to notice the duty the master owes to his servant and also to determine when an employee occupies the position of a fellow-servant and not that of a vice-principal for whose negligence the master is liable. It is the duty of the master to provide his servants with a safe place in which to work, with proper and suitable tools and machinery with which to perform their work, with suitable materials, with reasonably competent fellow-workmen with whom to work, and with such instruction to the young and inexperienced as may be necessary to warn them against the peculiar dangers incident to the kind of work in which they are engaged: *Prescott v. Ball Engine Company*, 176 Pa. 459. Having done this, the master has discharged his whole duty to his servant and is not liable for any injury the latter may receive while in his service by reason of the negligence of his co-laborer. This doctrine is so well established that it needs the citation of no authorities to sustain it. If, however, an employee be placed in a position to represent his employer so as to have absolute control and entire charge of the work, or a distinct and separate branch of it, then, in the performance of his duties in such representative capacity, he takes the place of the employer and his acts are those of his principal. An employer is likewise responsible for the acts of his employee if he entrust him with the performance of an imperative duty, absolutely obligatory upon the employer. These principles, as a result of our cases, are concisely and clearly stated by our Brother Mitchell in *Prevost v. Citizens' Ice, etc., Company*, 185 Pa. 621, as follows: "A vice-principal for whose negligence an employer will be liable to other employees must be either first, one in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him not mere authority to superintend certain work or certain workmen, but control of the business,¹ and exercising no discretion or oversight of his own; or, secondly, one to whom he delegates a duty of his own which is a direct, personal and absolute obligation, from which nothing but performance can relieve him."²

commits in furtherance of the master's business. The weight of authority is toward the view that the master is liable only where such superior negligently exercises the authority conferred upon him and not where he is himself performing the purely operative work of an inferior. *Forgarty v. St. Louis Transfer Co.*, 180 Mo. 490 (1904, the opinion contains an exhaustive review of the Illinois and Missouri decisions); *Gall v. Beckstem*, 173 Ill. 187 (1898); *Gann v. R. R.*, 101 Tenn. 380 (1898); *Contra, New Omaha, Etc., Co. v. Baldwin*, 62 Neb. 180 (1901); *Berea Stone Co. v. Kraft*, 31 Ohio St. 287 (1877). The question seems not to have been expressly decided in *Kansas Co. v. Peterson*, *supra*; *Brick Co. v. Shanks*, 69 Kans. 306 (1904).

¹ In support of this Mitchell, J., cites, in the above given case, *N. Y., L. E. & W. v. Bell*, 112 Pa. 400 (1886).

² In support of this, Mitchell, J., cites *Lewis v. Seifert*, 116 Pa. 628 (1887); *Ross v. Walker*, 139 Pa. 42 (1891), and *Prescott v. Ball Engine Co.*, 176 Pa.

In the application of this rule, however, the grade or rank of the servant for whose conduct the employer is sought to be made liable, is not the test of the employer's responsibility. It is the character or nature of the act of the employee which causes the injury that determines the liability of the employer. If the act or thing done resulting in the injury to the employee was a duty imposed upon the employer, then the negligent performance of it by an employee of any grade will render the employer liable, but if such act was in the line of the ordinary workman's duty as an employee, then the employer is not responsible, though the offending employee was a vice-principal in charge of the work generally.*

459 (1896). See also *Baltimore and Ohio R. R. v. Baugh* and *Crispin v. Babbitt*, *ante*.

While dicta in many Pennsylvania cases recognize both these kinds of "vice-principal", it would seem that, until 1908, at least, the recognition of the first was more apparent than real, due probably to respect for the decisions of the Supreme Court of the United States (see *B. & O. R. R. v. Baugh*, *ante*), and that the master's liability actually depended solely upon the nature of the act negligently performed or of the precaution omitted, as in New York, Massachusetts, New Jersey, etc. *Crispin v. Babbitt*, *ante*. In every case where the master was held liable for the negligence of a "vice-principal" in independent control of a distinct department of his business, the negligence lay in his improper performance of some one of the master's absolute and personal duties. *O'Dowd v. Burnham*, 19 Pa. S. C. 464 (1902); *New v. Milligan*, 27 Pa. S. C. 516 (1905); and many later cases have followed the principal case in holding that even a general manager, to make his master liable for his negligence, must not only be acting within the lines of his duties as such, but must be discharging some positive personal duty delegated to him, as manager or superintendent, by the master. *Casey v. Paving Co.*, 198 Pa. 348 (1901); *Miller v. Bridge Co.*, 216 Pa. 569 (1907); *King v. McClure*, 222 Pa. 625 (1909). And see the early case of *Mullan v. S. S. Co.*, 78 Pa. 25 (1875), p. 32. In *Caldwell v. Hickey*, 221 Pa. 545 (1908) and *Gilbert v. Elk Tanning Co.*, 221 Pa. 176 (1908), a distinct tendency is shown to make the master liable for acts and omissions of one in complete control of the business of a sort for which he would not be liable had the delinquent been a servant of the same grade as the one injured or a foreman. Compare with *Gilbert v. Co.*, *supra*, in which it was held that the company was liable, where the superintendent having removed the cover of a vat, in order to use it, failed to replace it, with *Staebler v. Warren-Ehret Co.*, 223 Pa. 129 (1909), where the foreman of a gang of roofers forbade them to put up a guard rail provided by the master; and with *Caldwell v. Hickey*, *supra*, where the master was held liable for the neglect of its superintendent to see that a mould which was to be constructed for a casting and then destroyed was fit and safe for use; compare *Whittaker v. Bent*, 167 Mass. 588 (1897), and *Ross v. Walker*, 139 Pa. 42 (1891). This seems in line with the intimation in many cases (see note 3, *Gitten v. William Porten Co.*, *post*) that though the work is such as may properly be entrusted to the discretion of the workmen themselves, none the less, if the master choose to assume the control and direction of it by placing it in charge of one whose whole duty and function is that of superintendence he makes himself liable for the manner in which the latter exercises the powers given to him.

* *Accord: Lindvale v. Woods*, 41 Minn. 212 (1889). "It follows," says Mitchell, J., p. 217, "that the same person may occupy a dual capacity of vice-principal as to some matters and of fellow servant as to others. Hence, if the defendants had delegated to M the duty of employing laborers for this work or of providing materials for the building of this trestle, and he had been guilty of negligence" therein, "the defendants would be liable, for these are duties which the master owes personally and absolutely. But in whatever he did on the work which was the object of their common employment, viz.,

In *Ross v. Walker*, 139 Pa. 49, the late Justice Williams, delivering the opinion of the court, said: "The person who is thus put in the place of the principal, to perform for him the duties which the law imposes, is a vice-principal, and *quoad hoc* represents the principal so that his act is the act of the principal. This is true, however, only when and so long as his acts are in discharge of the duties which the principal owes to his employees. Beyond this line he acts as a workman and not as a vice-principal."

These principles, applied to the facts of the case in hand, relieve it from any difficulty of solution. If it be conceded that Snyder

building the road, he was a mere fellow servant with the laborers, subject to his orders, and for his negligence in such matters the defendants would not be liable unless they were negligent in employing him." *Accord*: also *Klochinski v. Shores Lumber Co.*, 93 Wis. 417 (1896); *Barnicle v. Connor*, 110 Iowa 238 (1900); *Deep Run Mining Co. v. Fitzgerald*, 21 Colo. 533 (1895); *O'Neil v. Gt. Northern R. R.*, 80 Minn. 27 (1900); *Pasco v. Minneapolis, etc., Co.*, 105 Minn. 132 (1908). *Contra*: *Berea Stone Co. v. Knight*, 31 Ohio St. 287 (1877); *New Omaha, etc., R. R. v. Baldwin*, 62 Neb. 180 (1901); *Sweeney v. R. R.*, 84 Tex. 433 (1892), but only for the acts of one having not only power to direct business, but also power to engage and discharge employees. *Bryan v. R. R.*, 128 N. C. 387 (1901).

The fact that the plaintiff's injury is due to an act of manual labor performed by the superintendent, of a sort which might well have been left to a mere workman, does not necessarily relieve the master from liability. Where the injury results from the improper and unsafe methods adopted by the superintendent for performing the work, the master is as much liable where the superintendent himself takes part in its execution as where he directs his subordinates to carry it out. "It would be unreasonable that, by doing the careless act himself instead of ordering another, who felt constrained to obey, to do it, he relieved the company from liability." *Purcell v. R. R.*, 119 N. C. 728 (1896), p. 739; *Metropolitan R. R. v. Skola*, 183 Ill. 454 (1900), a foreman ordered a car repairer to work under a car upon a certain repair track and then, acting as motorman, drove without warning another car on the same track; *Dayharsh v. R. R.*, 103 Mo. 570 (1890), and *Taylor v. R. R.*, 121 Ind. 124 (1889); somewhat similar facts: *Norton Bros. v. Nadebok*, 190 Ill. 595 (1901), an employee in charge of machinery having ordered his assistant to put his hand into it, started it without warning; *Pittsburgh Bridge Co. v. Walker*, 170 Ill. 550 (1897); *Crystal Ice Co. v. Sherlock*, 37 Neb. 19 (1893); *Chattanooga, etc., R. R. v. Lawson*, 101 Tenn. 406 (1898). For an extreme application of this rule see *Cole Bros. v. Wood*, 11 Ind. App. 37 (1894).

There appears to be, also, a distinct tendency to hold that where a superintendent is performing one of the master's positive duties, the latter is liable not only if by reason of some neglect of the superintendent the master's duty is not adequately performed and so the servant is deprived of that protection which he had a right to expect, but also if the superintendent is guilty of any negligent act, though manual and operative, while engaged in performing the master's duties delegated to him. So in *Latscha v. Transit Co.*, 222 Pa. 201 (1908), it was held that a superintendent who, acting himself as motorman, took a car out to test it, made his master liable for his negligence in driving it. *Hess v. Adamant*, 66 Minn. 78 (1896), and see *Kentucky, etc., Co. v. Nance*, 165 Fed. 44 (C. C. A. 6th Circ., 1908). In *Willihan v. National Wheel Co.*, 128 Mich. 1 (1901), a distinction is drawn between negligent acts done in testing machinery for the purpose of ascertaining if it is safe for the employee's use, in which case the master is liable, and those done while testing it to see if it is efficient, when he is not, but see, *contra*, *Latscha v. R. R.*, *supra*.

In *Shumway v. Walworth, etc., Co.*, 98 Mich. 411 (1894), it is stated that where the superintendent is engaged in performing an act which he had the right to perform only by virtue of his authority as superintendent, the master

was a vice-principal under his general employment by the defendants, which is very doubtful, it is manifest from the indisputable testimony that his negligent act which caused the plaintiff's injuries was performed when he was discharging the duties of a co-worker of the plaintiff and not the personal and absolute duties imposed upon his principal. The defendants provided proper and safe appliances with which to remove the stone from the car to the retaining wall and competent workmen were employed to do the work. There is no allegation of incompetency on the part of the masons, engineer, laborers or the employees whose duty it was to drill the hole in the stone and to place the dogs on the stone. They were admittedly all competent. Instead, however, of permitting the employees engaged in the work to perform their respective duties, Snyder assumed the duty of a co-worker of the plaintiff and placed the tongs on the stone so improperly and carelessly, that the stone fell from their grasp and injured the plaintiff. The work he did was not in the line of his duty as representing his principal, but was strictly that of a fellow-servant of the plaintiff. For his negligent act, therefore, while performing this service, the defendants are not responsible.

The contention of the appellee that the drilling of the holes in the stones was an absolute duty imposed on the defendants is not tenable. The holes in which the tongs were to be inserted in making the removal of the stones were not an appliance or tool to be furnished by the master, but simply a means of adjusting the machinery to the material being removed. The stones were shipped on cars to the place where they were to be used. An employee in the gang under Snyder drilled the holes in the stones as part of the work required to be done in their removal. This employee, designated in the testimony as the "stone man", was engaged with the other employees of Snyder's gang in removing the stones from the cars and depositing them on the wall. He was a co-workman of the other

is liable for any negligence in his performance of it, but compare the facts with those in *Hess v. Adamant Co.*, *supra*.

So statutes making the master liable for the negligence of an employee "entrusted with and exercising superintendence" and "whose whole duty is that of superintendence"—*Massachusetts*, Laws of 1887, ch. 270, § 1, subsection 2; *Alabama*, Civil Code, 1886, § 2590 (2); *Colorado*, Laws of 1893, ch. 77 § 1 (2); *New York*, Laws of 1902, ch. 100, § 1 (2)—have been construed to make the master liable only where the negligent act was not only done by the superintendent, but was a negligent "act of superintendence." *Guilmartin v. Solway Process Co.*, 189 N. Y. 490 (1907), 16 L. R. A. N. S. 146, with valuable note; *Freeman v. Steel Co.*, 137 Ala. 481 (1902); *Cashman v. Chase*, 156 Mass. 342 (1892); *Joseph v. Whitney Co.*, 177 Mass. 176 (1900); *Hoffman v. Holt*, 186 Mass. 572 (1904); *Refining Co. v. Peterson*, 8 Kans. App. 316 (1899).

So, too, it is held that, where the superintendent is negligent in directing and controlling the work, the master is none the less liable, under such statutes, though the superintendent himself, alone or in conjunction with the workmen under him, manually carries out his improper place. *McKenna v. Gould Wire Co.*, 197 Mass. 406 (1908); *McPhee v. New England Co.*, 188 Mass. 141 (1905); *Carlson v. Co.*, 113 App. Div. (N. Y.) 1036 (1906); *McBride v. Co.*, 95 App. Div. (N. Y.) 336 (1904); *Rippy v. R. R.*, 80 S. C. 539 (1908).

servants of the gang, having the same master and being engaged in the same common employment. The thing to be done by Snyder's gang of workmen was the erection of the wall, which included the removal of the large stones from the cars to the wall. The derrick, engine and tongs were the instruments to be used in effecting this removal and they were suitable for the work. Placing the tongs on the stones in a manner to secure their safe removal was the duty of the men who were on the car for that purpose. In this particular instance, Snyder took the place of the men employed for that purpose, and if he hooked the tongs on the stone in an improper manner, either by failing to insert them in the holes drilled for the purpose or otherwise, so as to make the removal of the stone unsafe, it was not his act as a vice-principal but as a subordinate employee whose duty it was to perform the service. See *Ross v. Walker, supra*, and *Prescott v. Ball Engine Co., supra*.

Mr. Justice DEAN, dissenting: In my opinion this judgment is wrong; it is not vindicated by reason or authority. The evidence of plaintiff tended to establish the fact that Snyder, under whose supervision this part of the work was being done, was there as the representative of and in place of his employers, these defendants. On this evidence, under all the authorities, he was a vice-principal and his employers are answerable for his negligence.

Assume that there was some conflict in the evidence, still the question was one of fact to be determined by the jury. If the evidence of plaintiff be believed, and the jury in this case did believe it, this man Snyder was neither fitted by temper nor discretion for such a responsible position; one where the lives and limbs of workmen depended on prudent management; by his gross mismanagement and recklessness the plaintiff was seriously injured. Why should not those who placed such a man in such a position, with all the unchecked powers of an employer, be held responsible for his negligence? He was no more a fellow-workman of plaintiff than the employers themselves. The tendency to exempt employers from just responsibility for the negligence of supervisors and bosses to whom they entrust such grave duties is in my opinion too pronounced, and will lead to consequences which, if not now clearly foreseen, can, with very reasonable certainty, be conjectured. I dissent from the judgment.

(b) Duty to Employ Competent Servants.

REISER *v.* PENNSYLVANIA CO.

Supreme Court of Pennsylvania, 1892. 152 Pa. 38.

JUSTICE MCCOLLUM: Adam Reiser was in the employ of the Pennsylvania Company as a fireman, and the proximate cause of the collision in which his life was taken, was the negligence or incompetency of W. W. Crossman, who was a station agent and telegraph operator in the employ of the same company, and his

fellow servant. There was evidence tending to show that Crossman was not properly qualified for the place he occupied, but this alone was not sufficient to charge the company with negligence in employing him or in retaining him in its service. It should also appear that the company knew or in the exercise of reasonable diligence should have known that he was incompetent to discharge the duties of the position to which he was assigned. An effort was made to affect the company with knowledge of his incapacity, and the result of it is found in the testimony of G. L. Campbell, Jacob E. Swap and G. D. Gilson. Campbell, who was in the employ of the Pennsylvania Company at Albion as station agent and telegraph operator for some time prior to July, 1885, testified that Crossman was in his office from the spring of 1884 to the first of January, 1885, for the purpose of learning and practicing telegraphy, and that when he left it he was not a skillful operator. He also testified that the telegraph operator at Pittsburgh, and Perdue, the chief train dispatcher, wished him "to keep that cub (meaning Crossman) off the line." He does not state how, when or to whom this wish was expressed, or what reason, if any, was given for it. He admitted, however, that he kept Crossman in his office in violation of a rule of the company, and it is not strange that his fellow servants "wished" him to comply with a reasonable regulation established by their common employer. Jacob E. Swap testified that directly after Crossman was put at Wheatland as station agent, he said to Perdue "what are you doing with that noodle up at Wheatland?" That Perdue inquired what he meant, and he replied, "Crossman, the agent there, he will get you into trouble yet; he don't know what he is doing half the time." He also testified that Crossman "was very flighty in his disposition and was rattled in his business," and that he thought he was incompetent. Gilson was of opinion that Crossman was not qualified for the place he filled, although he would not say he was an unskilled operator. This is the evidence relied on by appellant to show that the company knew Crossman was incompetent at the time it employed him, or retained him in its service after notice of his incompetency. It should be stated in this connection that Campbell was the only witness whose knowledge of Crossman's alleged incapacity antedates his employment by the Pennsylvania Company, and this knowledge relates to a period several months prior to such employment. On this branch of the case the company might have relied on the presumption that it exercised due care in the selection of its servant whose negligence caused the collision, because Campbell's evidence was insufficient to rebut it. But it did not do so. It showed by testimony which was not disputed that such care was in fact exercised. Did the company have notice while Crossman was in its service that he was incompetent? We think not, unless notice to Perdue was notice to the company. It is contended by the appellant on the authority of *Lewis et al. v. Scifert*, 116 Pa. 628, that Perdue was a vice-principal, and that his knowledge of the incompetency of the station agents and telegraph operators in the service of the company must be considered as its knowl-

edge. This might be so if he was clothed with the power of employing and discharging such servants. But he was not charged by the company with its duty in reference to the selection and retention of its employees. To the extent that he was the representative of the company in the performance of a positive duty it owed to its servants, it is responsible to them for his negligence, but beyond that it is not. The contention of the appellant that the knowledge of *Perdue* respecting the qualifications of *Crossman* was the knowledge of the company finds no support in *Lewis v. Seifert, supra*. In that case the company was held liable for an injury to an employee caused by the negligence of its representative in the performance of a duty it owed to its servants. In this case the death of *Reiser* was attributable to the negligence of *Crossman* who was his fellow servant, and as the company was not in default in employing him, or in retaining him in its service, it is not responsible for the consequences of his negligent act.¹

¹ There is a practical unanimity of decision throughout the United States that the duty of employing a sufficient number of competent servants is both continuous and nondelegable. *Flike v. R. R.*, 53 N. Y. 549 (1873); *Laning v. R. R.*, 49 N. Y. 521 (1872), and see §§ 572-573, *Labatt on Master and Servant*. In England, at least before the Employers' Liability Act of 1880, had not merely directly altered the law but had indirectly influenced judicial opinion, this duty, like all others, was satisfied by committing it to a competent manager or superintendent.

If a sufficient number of competent workmen are employed the assignment of them to any particular piece of work is a matter of mere operative detail, and a foreman in so doing acts as a servant and not as one engaged in performing a personal absolute duty owed by the master. *Hilton v. Fitchburg R. R.*, 73 N. H. 116 (1904); *Hussey v. Cogger*, 112 N. Y. 614 (1889), but see, *contra*, *Brown v. Rome Factory Co.*, 5 Ga. App. 142 (1908), one of a gang of men, engaged in moving a heavy ladle of molten iron, called away, leaving the force employed dangerously insufficient, and *Kronzer v. Spencer-Kellogg Co.*, 124 N. W. 6 (Minn., 1910), where it was held that an employee to whom was left the determination of the competency of a workman to perform a particular piece of work, acted as vice-principal in assigning such workman thereto.

In Pennsylvania evidence of previous misconducts of the servant is held inadmissible to show that his employer had notice of his incompetency. Only his general reputation for competency or incompetency is admitted. *Frazier v. R. R.*, 38 Pa. 104 (1860), but see *Huntingdon, etc., R. R. v. Decker*, 82 Pa. 119 (1876), and in Massachusetts it is rejected because of its tendency to introduce a multiplicity of collateral issues. *Hatt v. Nay*, 144 Mass. 186 (1887); *Connors v. Morton*, 160 Mass. 333 (1894). In general, however, such evidence is held admissible. *Baulec v. R. R.*, 59 N. Y. 356 (1874); *Pittsburgh, etc., R. R. v. Ruby*, 38 Ind. 294 (1871). No servant, however, should be deemed incompetent and unfit to be employed or retained because of one or even more acts of casual inadvertence. *Baulec v. R. R.*, *supra*; *Baltimore Elevator Co. v. Neal*, 63 Md. 438 (1886); *Kellogg v. Stephens Co.*, 125 Mich. 222 (1900), and cases cited note 3; *Labatt, Master and Servant*, § 188. But a single act of misconduct may be of such a reckless, wanton or malicious character as to show the servant guilty thereof to be totally unfit for employment. *Baulec v. R. R.*, *supra* (*semble*); *Wabash, etc., R. R. v. Brow*, 65 Fed. 941 (1895); or may show him to be physically unsuited for the work committed to him. *B. & O. R. R. v. Camp*, 65 Fed. 952 (1895).

(c) Duty to Provide Safe Instrumentalities for Work and Safe Place in Which to Work.

MURPHY v. BOSTON & ALBANY RAILROAD COMPANY.

Court of Appeals of N. Y., 1882. 88 *N. Y. Appeals Reps.* 146.

ANDREWS, C. J.:¹ The boiler of the defendants' locomotive "Sacramento" exploded while in the repair shop of the company at East Albany, killing Francis Murphy, the plaintiff's intestate, who was engaged at the time by the direction of the master mechanic in setting the safety valve so as to allow the standard pressure. The locomotive had been taken to the shop for repairs some two weeks before the explosion, having been reported by the engineer as in bad order.

The locomotive had, in accordance with the usual practice, been put into the hands of the boilermakers, who were competent and skillful mechanics, for examination and repair; they had reported to the master mechanic that the locomotive was "all right," and it was then, after passing through the hands of the machinists, turned over to Murphy and another mechanic, who were directed to set the safety valve, which was, as usual, the last thing to be done before putting the engine on the road. On examination of the boiler of the "Sacramento" after the explosion, defects therein were found and the evidence tended to show that these defects had caused the explosion and that they would have been discovered by the boilermakers if they had performed their duty to make thorough inspection of the boiler, with a view to ascertain whether any defects existed. The judge nonsuited the plaintiff, and it must be assumed that the negligence of the boilermakers was one of the efficient causes of the accident.

Upon these facts the question arises, whether the company is liable for the death of Murphy, resulting from the negligence, primarily, of the boilermakers. They, and the intestate, were co-servants of the defendant, and it is the general rule of law that the master is not responsible to one servant for an injury occasioned by negligence of a co-servant of the common employer. To this rule there are two well-defined exceptions: *first*, where the servant, whose negligence caused the injury, was an unfit and incompetent person to be intrusted with the duty to which he was assigned, and the accident resulted from his incompetency and unfitness (*Laning v. N. Y. Central R. R. Co.*, 49 *N. Y.* 521); *second*, where the accident resulted from unsafe and imperfect machinery and appliances, furnished for the use of the servant in the master's business. (*Laning v. N. Y. Central R. R. Co.*, *supra*; *Flike v. Boston & Albany R. R. Co.*, 53 *N. Y.* 550; *Fuller v. Jewett*, 80 *Id.* 46.)

These exceptions, however, are subject to the qualifications that the duty imposed upon the master to employ competent servants,

¹ The facts are condensed from those given in the opinion.

and furnish fit and safe machinery, is not absolute, but relative. The master does not guarantee either the competency of the co-servants, or the safety of the machinery and appliances. He undertakes to use due and reasonable care in both respects, and that there shall be no negligence on his part or on the part of any person intrusted by him with the business of employing servants and providing safe machinery, etc. It is plain that the master's liability, if sustained in this case, rests upon the second exception stated, viz.: the negligent furnishing of an unsafe machine for the use of the intestate. The competency of the boilermakers and machinists employed in repairing the locomotive before it came to the hands of the intestate and Smith, is not questioned. The rules of the shop were comprehensive, and required a full examination by the boilermakers and machinists to discover defects. Their negligence is not a ground of action against the master, unless as between the intestate and the master it was the master's duty to ascertain before the intestate and Smith were put to setting the valve that the boiler was safe and would bear the required pressure. We think this case is not within the principle which holds the master responsible for unsafe machinery furnished for the use of the servant. The case of *Fuller v. Jewett* (80 N. Y. 46) is a distinct authority for the proposition, that if this locomotive had been sent out from the shop and afterward exploded while in use on the defendant's road, injuring the engineer or other servants of the defendant, the company would have been responsible. The negligence of the boilermakers in the case supposed would be regarded as the negligence of the master. The risk of the negligence of the repairers and machinists would not be considered one of the risks which a servant in whose hands the machine was subsequently placed for use had assumed. The placing of the locomotive on the road for use would be an assurance that it was fit and safe; and an engineer or other servant employed on the train could not be supposed to have known the condition of the locomotive, or whether the men employed to make repairs were competent, or the manner in which the work had been done. In this case Murphy was not, we think, a servant in whose hands the locomotive was placed by the defendant for use, within the principle of *Fuller v. Jewett*, and like cases. The locomotive was sent to the repair shop in order that it might be made fit for use. The mechanics in the repair shop, including the intestate, were employed for the purpose of repairing defective locomotives.* The intestate and his co-laborers in the shop were engaged in the same department of service, worked under the same control, and in the case in question, the boilermakers and the

* Where a servant is employed to repair machinery or structures he must expect to find them defective, their bad condition being the very reason and occasion for his labor on them. See § 268 *Labatt, Master and Servant*, and notes thereto, and *Maloney v. Florence, etc.*, R. R., 39 Colo. 384 (1907), 19 L. R. A. N. S. 348. And this though their bad condition be due to the antecedent negligence of other employes of the same master. *Dartmouth Spinning Co. v. Achord*, 86 Ga. 14 (1889). Nor can a servant employed in construction work expect the same perfection of equipment as he is entitled to find in the finished plant. § 237, *ibid*, and notes.

other mechanics were employed to effect the same object, viz.: the reparation of the "Sacramento." It is true that the work was done in successive stages, and different parts of the work were intrusted to different persons. The refitting of the valve and its adjustment to the required pressure, were the last things to be done. This work was, however, as necessary in fitting the locomotive for use as the work of the boilermakers or machinists. The intestate had an opportunity to inform himself of the competency of his co-servants in the shop. He doubtless supposed that the boilermakers had performed their duty; unfortunately they had neglected it. But we think the risk of their negligence was one of the risks he assumed, as incident to his employment in the common service. It would be too close a construction, to hold that the repairs were completed when his work commenced, and that the setting of the valve was an independent and disconnected service in respect to a machine put into his hands by the company for use. This claim of the plaintiff's counsel would make the master responsible to each successive employe engaged on the repairs for any negligence of a co-employe, whose work was prior in point of time, although done in effecting the common purpose in which all were engaged.³ This would, we think, be extending the liability of the master further than is warranted by the adjudged cases.

The case is not free from difficulty, but we are of opinion that the nonsuit was properly granted, and the judgment should, therefore, be affirmed.

³*Accord: Armour v. Hahn*, 111 U. S. 313 (1884), a carpenter engaged in the erection of a building, stepped upon the projecting end of a joist, which being insecurely fastened, gave way, causing him to fall thirty feet to the ground. The master's duty to provide a safe place, etc., for his servants to work "does not," said Gray, J., p. 318, "impose on him the duty, as toward them, of keeping a building which they are employed in erecting in a safe condition at every moment of their work, in so far as its safety depends on the due performance of that work by them and their fellows. If the joist was at the time insecure, it was either by reason of the risks incident to the * * * unfinished condition of the building; or else by reason of some negligence of one of the carpenters or bricklayers, all of whom were employed and paid for by the same master and were working in the course of their employment at the same time and place, with an immediate common object, the erection of the building." See also *Citrone v. Construction Co.*, 188 N. Y. 339 (1907), 19 L. R. A. N. S. 340, with valuable note; *Russell v. R. R.*, 188 N. Y. 344; *Maloney v. R. R.*, 39 Colo. 384 (1907), but compare *Hilger v. Walla Walla*, 50 Wash. 470 (1907), where, however, the employer had, by a superintendent, assumed the direction and supervision of the work, the digging of a ditch for the laying of water pipe. Compare also *Halwas v. American Granite Co.*, 123 N. W. 789 (Wis., Dec., 1909), where it was held that a crane crew moving a granite block and placing it in position for the plaintiff, a stone cutter, to carve lettering upon it were not fellow servants of the latter's, but were entrusted with the master's duty of providing him a safe working place; but see *Marshall, J.*, concurring.

TITUS v. BRADFORD, ETC., RAILROAD CO.

Supreme Court of Pennsylvania, 1890. 136 Pa. 618.

MITCHELL, J.: We have examined all the testimony carefully, and fail to find any evidence of defendant's negligence. The negligence declared upon is the placing of a broad-gauge car upon a narrow-gauge truck, and the use of "an unsafe, and not the best appliance, to wit, the flat centre plate;" or, as expressed by the learned judge in his charge, in using on the narrow-gauge road the standard car bodies, and particularly the New York, Pennsylvania & Ohio car body described by the witnesses. But the whole evidence, of plaintiff's witnesses as well as of defendant's, shows that the shifting of broad-gauge or standard car bodies on to narrow-gauge trucks for transportation, is a regular part of the business of narrow-gauge railroads, and the plaintiff's evidence makes no attempt to show that the way in which it was done here was either dangerous or unusual. Haleman says the majority of the bearings fit, and those that do not, have hard-wood blocks put under them, and the blocks are fastened with telegraph wire, and he was not positive but that some were bolted on. The particular car complained of was blocked and wired. Cazely and Richmond say it was the custom to haul these broad-gauge cars on the narrow-gauge trucks, though most of the broad-gauge were Erie cars, of a somewhat different construction; and Morris says the car in question was put on a Hays truck, fitted for carrying standard-gauge cars on a narrow-gauge road, and that this particular kind of "Nypano" car was so hauled quite often. These are plaintiff's own witnesses, and none of them say the practice was dangerous. The nearest approach to such testimony is by Morris, who says he "had his doubts."

But, even if the practice had been shown to be dangerous, that would not show it to be negligent. Some employments are essentially hazardous, as said by our Brother Green, in *North. C. Ry. Co. v. Husson*, 101 Pa. 1, of coupling railway cars; and it by no means follows that an employer is liable "because a particular accident might have been prevented by some special device or precaution not in common use." All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, "reasonably safe" means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may

be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community.

In *Ship-building Works v. Nuttall*, 119 Pa. 149, our Brother Williams said: "The testimony shows that such an attachment is not in general use. * * * It is not enough that some persons regard it as a valuable safeguard. The test is, general use. Tried by this test, the saw of the defendant was such a one as the company had a right to use, because it is such as is commonly used by mill owners, and it was error to leave to the jury any question of negligence based on the failure to provide a spreader."¹ See also *Payne v. Reese*, 100 Pa. 306; *Sykes v. Packer*, 99 Pa. 465; *Allison Mfg. Co. v. McCormick*, 118 Pa. 519; and *Lehigh Coal Co. v. Hayes*, 128 Pa. 294.

As already seen, the testimony of plaintiff's own witnesses showed the custom of the appellant company to perform this part of its work in the way complained of. The defendant's witnesses showed the custom of at least two other narrow-gauge roads to use the same way. There was no countervailing evidence on part of plaintiff, though, as was said in the closely analogous case of *North C. Ry. Co. v. Husson*, 101 Pa. 1, "it was certainly a part of the duty of the plaintiff to affirmatively establish that the loading of cars in the manner complained of was an unusual occurrence." In the absence of such evidence, the defendant's last point should have been affirmed, and a verdict directed for the defendant.²

¹ It appeared that the attachment in question had been tried by several shops, and that in some it had been discarded as impracticable; there certainly appear to be "no general agreement among mill owners or practical sawyers that it was a desirable or a useful attachment."

² Accord: *Bethlehem Iron Co. v. Weiss*, 100 Fed. 45 (C. C. A. 3rd Circ., 1900), and cases cited in *Labatt, Master and Servant*, § 44, notes 1 and 4. Many cases hold that the test is the customary conduct of "men of ordinary prudence and caution engaged in like business." *Prybilski v. N. W., etc., Ry. Co.*, 98 Wis. 413 (1898), and note 3, § 44, *Labatt, Master and Servant*. In *Wabash R. R. v. McDaniels*, 107 U. S. 454 (1882), such usage is regarded only as evidence of what is proper and not as being the standard by which to measure of the sufficiency of the particular appliance, etc.; for cases following this view. See *Labatt*, § 50 and notes, but compare *Washington, etc., R. R. v. McDade*, 135 U. S. 554 (1890). The weight of authority inclines to the view that this test applies also to determine the sufficiency of the system of work adopted. *Hunt v. Hurd*, 98 Fed. 683 (C. C. A. 7th Circ., 1900); *Lehigh, etc., Co. v. Hayes*, 128 Pa. 294 (1889); *Hennessy v. Bingham*, 125 Cal. 627 (1899); *Wood v. Heijes*, 83 Md. 257 (1896); contra, *Kansas City, etc., R. R. v. Burton*, 97 Ala. 240 (1892). As to whether the sufficiency of a method of inspection is to be so determined see *Labatt*, § 163, note 1. Where a particular protection is required by statute a general custom to disobey its provisions will, of course, not justify the defendant's disobedience. *Jones v. American Caramel Co.*, 225 Pa. 644 (1909). Nor will it avail a master, whose plant, originally better than the ordinary, deteriorates through negligent lack of repair, that it is still as good as that usually provided. *Bender v. R. R.*, 137 Mo. 240 (1897); *Lake Erie, etc., v. Mugg*, 132 Ind. 168 (1892), and see *Ross v. Pearson Co.*, 164 Mass. 257 (1895), and *Reese v. Herchey*, 163 Pa. 253 (1894).

GITTENS v. WILLIAM PORTER COMPANY.

Supreme Court of Minnesota, 1903. 90 Minn. 512.

LEWIS, J.: Respondent company was engaged in the construction of the Great Northern car shops on Dale street, in the City of St. Paul, consisting of six separate buildings located in the immediate vicinity of each other. Appellant was engaged as a general assistant in different kinds of work about the buildings, and had several years of experience as a bridge carpenter, and was considered an all-around competent workman. The apparatus used in elevating the lumber and material to the roof was called a "hoist," made of three pieces of plank in the form of a right-angle triangle. On the day prior to the injury, appellant, with another workman, had been assisting in operating the hoist involved in this controversy, and had thereafter been employed in a similar manner in handling material with another hoist upon one of the other buildings. While appellant was so engaged, he was called by the foreman to help in elevating material with the hoist in question. According to the undisputed testimony, appellant and a fellow-workman left the building on which they were at work, and went upon the one where the hoist was situated; appellant taking his position at the edge of the roof, near the cornice, and, assuming that the hoist was properly adjusted, leaned over the edge of the building to guide the rope which ran through a pulley and was attached to a bundle of flooring being pulled up by means of a horse on the ground below, when, without warning, the hoist tipped over and was pulled to the ground by the weight of the load, taking appellant with it. This action for damages is based on the theory that respondent was guilty of negligence in failing to provide a reasonably safe appliance and a reasonably safe place for the performance of the work.

At the close of the case respondent rested, with leave to move for a motion to direct a verdict upon the following grounds: That appellant had failed on all the evidence to establish a *prima facie* case against respondent; that there was no evidence to establish negligence approximately causing the injury; that it affirmatively appeared from the evidence that the negligence, if any, was that of appellant's fellow-servant; and that as a matter of law appellant assumed the risk attending his work in connection with the hoist. Motion granted, and verdict directed in favor of respondent.

•There are two well-defined rules established by the decisions of this court in respect to the duty of the master in furnishing tools, machinery, and appliances used by employees: First, Where the apparatus or appliance is furnished by the master, and is not one required to be constructed in the ordinary progress of the work, then the duty rests upon the master to see that such appliance is reasonably safe for the use intended. In such case it is immaterial whether the master manufactures the appliance or whether it is purchased.¹ The principle is the same, and rests upon the natural

¹ Or where, as in *Carr v. Gen. Fire Extinguisher Co.*, 224 Pa. 346 (1909), a foreman in charge uses an appliance, in this case a ladder, found on the

right of the workman to rely upon such appliance as being what it is represented to be. The master has a better opportunity to know of and test the sufficiency of the apparatus, and his experience as an employer or master better qualifies him than an ordinary employee to pass upon its efficiency. Second. Where the structure, apparatus, or appliances are a part of or incidental to the work being carried on, and the workmen construct them as a part of their employment, the master is relieved from such special supervision, and each employee assumes the risk attending the negligence of fellow-workmen in respect thereto.²

The latter rule is illustrated by the cases of *Fraser v. Red River Lumber Co.*, 45 Minn. 235, 47 N. W. 785; *Marsh v. Herman*, 47 Minn. 537, 50 N. W. 611; *Oelschlegel v. Chicago G. W. Ry. Co.*, 73 Minn. 327, 76 N. W. 56. It is often the subject matter of special agreements, and the master may voluntarily assume the responsibility of furnishing such appliances or structures, although ordinarily they would be treated as a part of the work.³ In such cases the employees have a right to assume that the master will perform his duty, and an illustration of this principle is found in *Sims v. American S. B. Co.*, 56 Minn. 68, 57 N. W. 322, and *Blomquist v. Chicago, M. & St. P. Ry. Co.*, 60 Minn. 426, 62 N. W. 818. There are also cases where, from the peculiar character of the temporary structure, and where it is put to some unusual test, the person injured has had no knowledge or opportunity to judge of its efficiency; and then the master will be liable for its faulty construction. This principle is illustrated in the case of *Hagerty v. Evans*, 87 Minn. 435, 92 N. W. 399.⁴

Was the hoist in this case an appliance which required the master to see that it was properly constructed, or was it an apparatus to be made, as occasion required, by the workmen engaged in the general enterprise? We have no doubt, that, if a complete derrick or hoist had been manufactured by respondent, or purchased by it, and sent to the place of work, and an injury had occurred by reason of some defect therein, the master would be liable under the general rule; but from the evidence we are forced to the conclusion that the hoist was not such an implement. No particular material was furnished for its construction, and the necessary planks were selected

premises, and this, though he expressly disregards his positive instructions to procure all tools, etc., by requisition from his employer's nearby storehouse.

² Different courts differ as to whether a particular sort of appliance is a permanent instrumentality which it is the master's duty to see is safe when supplied or one merely temporary, which it is the workmen's duty to construct as needed. Compare *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485 (1901), with *Buck v. New Jersey Zinc Co.*, 206 Pa. 132 (1902), both cases where through the negligence of the blacksmith employed on the premises by the master, a link in a car chain was unsafe.

³ Accord: *Ackerson v. Dennison*, 117 Mass. 407 (1875) and cf. with it *Kelley v. Norcross*, 121 Mass. 508 (1877), and compare *Caldwell v. Hickey*, 221 Pa. 545 (1908) with *Whittaker v. Bent*, 167 Mass. 588 (1897), and *Ross v. Walker*, 139 Pa. 42 (1891), and see *Woods v. Lindvale*, 4 U. S. App. 49 (C. C. A. 8th Circ., 1891), and *Miller v. R. R.*, 109 Mo. 350 (1892), p. 356, see *Raines v. Tetley-Klem Co.*, 149 Mo. App. 576 (1910), where it was held that though the plaintiff's gang build the scaffold themselves, a member of another gang directed by the superintendent to repair it is not the plaintiff's fellow servant.

from material on the ground, used in the erection of the building. No particular class of workmen was designated by the master to select the timber and construct the hoist, in the sense that such employment became an independent part of the work, within the doctrine of *Sims v. American S. B. Co.*, *supra*. The affair was of a simple design, easily and readily put together, and for a temporary purpose. The fact that the foreman directed such a hoist to be made and used at the particular time, did not, under the evidence in this case, make the master liable upon the principle that he had voluntarily assumed the responsibility of its construction. Appellant was a fellow-workman with the carpenters engaged in laying the floor. He assisted in elevating and carrying the lumber to them, and they put it in place; and, upon occasion, he too, was engaged in nailing down flooring.⁵

Further, if the hoist was properly made, and the injury was not occasioned by any inherent defect, but occurred because it had been improperly fastened to the roof, the master is not liable for the same reason above stated.

There is no application in this case of the doctrine that the master was required to furnish a reasonably safe place for appellant to work in. The erection, fastening, and operation of the hoist constituted a mere detail of the general work, and the contract of hiring contemplated that appellant assume the risks incident thereto. "The defendant, as master, was under no implied contract with the plaintiff that other servants engaged in the same employment should not adopt or pursue unsafe methods." *Cornelison v. Eastern Ry. Co.*,

⁵ *Accord*: *Ross v. Walker*, 139 Pa. 42 (1890); *Christiansen v. Cane Co.*, 76 N. J. L. 231 (1908). It is not the master's duty "after having provided materials ample in quantity and quality" (for the building of the scaffolding or false work necessary in the construction of a bridge), "to supervise the selection of every stick for every purpose." "The actual selection out of this stock, of the sticks needed from time to time, was not his duty but that of the workmen themselves," per Williams, J., p. 51; *Kennedy v. Spring*, 160 Mass. 203 (1893). In *Prescott v. Ball Engine Co.*, 176 Pa. 459 (1896), it was held that the plaintiff can recover only if there was no other tool or material available better than that selected, and that it was not negligence to allow a rope to remain in stock when by use it had become so weakened as to be no longer capable of bearing heavy weights, if it was still fit for some use in the owner's business, but if the tools (*Farrell v. Eastern Mfg. Co.*, 77 Conn. 484 [1905], but see *contra* [seem], *Maryland Clay Co. v. Goodnow*, 95 Md. 330 [1902], or material *Twomey v. Swift*, 163 Mass. 273, [1895]), is wholly unfit and dangerous for any use in the defendant's business, it is negligence in him to keep it in stock, and he is not released from liability by the concurrent negligence of the servant who negligently chose it, instead of other safe tools or material also available. So if a sufficient number of competent workmen are provided, the master is not liable for the negligence of a foreman in assigning an inexperienced or physically incapable workman to a particular piece of work. *Hilton v. Fitchburg R. R.*, 73 N. H. 116 (1904), or in not providing a sufficient force to make the work safe. *Hussey v.* 112 N. Y. 614, but see *contra*, *Brown v. Rome Factory Co.*, 5 Ga. App. 142 (1908), where it is assumed that the master is liable if a foreman by calling away one of the workmen engaged on a job leaves the force employed dangerously insufficient, and compare *Flike v. R. R.*, 53 N. Y. 549 (1873).

50 Minn. 23, 52 N. W. 224.* See also *Ling v. St. Paul, M. & M. Ry. Co.*, 50 Minn. 160, 52 N. W. 378, and *Dixon v. Union Ironworks*, *supra*, page 492.

Order affirmed.

NORD DEUTSCHER LLOYD STEAMSHIP COMPANY v. INGEBREGSTEN.

Court of Errors and Appeals of New Jersey, 1894. 57 N. J. Law, 400.

DIXON, J.: In an action by an administratrix to recover damages resulting from the death of her intestate, it appeared that the deceased was a stevedore in the employ of the defendant and was killed while unloading one of the defendant's steamships at the dock in Hoboken. The circumstances of his death were as follows: The ship's cargo, consisting of bags of rice, weighing about two hundred and fifty pounds each, was hoisted out of the hold by means of a wire rope fifteen-sixteenths of an inch in diameter, called a "hanger," suspended from one of the ship's masts and having its lower end held over the hatch by another wire rope called an "outhaul"; the lower end of the hanger was formed into a loop by being bent around an iron thimble and spliced upon itself with hemp lashing for a foot or two above the thimble; the thimble was shaped like a horse's collar inverted, except that the upper ends were not quite closed; into this thimble were hooked the lower end of the outhaul, and also the upper end of the vertical hoisting apparatus, at the lower end of which was a sling to hold the bags of rice; the work of the deceased was to place the bags in the sling and fasten the sling to the apparatus for hoisting, as several slings were in use, he would frequently be engaged in filling one sling beneath the hatchway while another was ascending; and while he was thus occupied the hanger broke at the open end of the thimble and the bags fell upon him, inflicting injuries from which he soon died.

At the close of the plaintiff's case the defendant moved for a nonsuit, on the ground that the testimony did not indicate any negligence of the defendant and did establish contributory negligence by the deceased, which motion was denied and an exception sealed.

The plaintiff's evidence tended to prove that the hanger, if in good order, would sustain a weight of about fifteen tons, and had on it when it broke less than one ton; that it had been in use two or three times a week for about seven years; that before the accident it was rusty, and at the point of fracture had been abraded by the

*"It will not do to say that, because Ryan's engine was in the way, and collided with the decedent's train, the track was not clear, and therefore the master had failed in his duty of providing a safe place for the employee to work in and upon. * * * The true idea is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negligent handling of the machinery shall create danger." *Brewer, J., Howard v. R. R.*, 26 Fed. 837 (1886), p. 842.

ends of the thimble; that these defects were discoverable on removing the lashing by which the splice was made, and that the apparatus was supplied by the defendant and kept in charge of Gerhart Schau, its storekeeper, whose duty it was to look after all the gear used at the dock and see that it was in good order.

Upon this evidence we think it became a fair question for the jury whether the accident had not happened because of a defect in the hanger which reasonable inspection would have discovered, and reasonable prudence have remedied. Supposing the jury might decide that question in favor of the plaintiff, the question of law arises whether the defendant had performed its duty as employer, by delegating to its storekeeper, Schau, the duty of inspection and repair.

The master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing suitable machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals. *Union Pacific Railroad Co. v. Daniels*, 152 U. S. 684. So far the authorities are at one. Almost as unanimous are they in the proposition that, if the master selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible for the fault. *Northern Pacific Railroad Co. v. Herbert*, 116 U. S. 642, and cases there cited; *Baily v. Rome, Watertown and Ogdensburg Railroad Co.*, 139 N. Y. 302; *Hankins v. New York, Lake Erie and Western Railroad Co.*, 37 N. E. Rep. 466; *Toy v. United States Cartridge Co.*, 159 Mass. 313.

Discrepancies, however, have arisen in the application of the latter rule, because of another rule firmly established, that the master is not responsible to his servant for the negligence of a fellow-servant engaged in a common employment. In determining whether an employee, through whose negligence defects in the machinery have failed of discovery or repair, is a representative of the master in the discharge of the master's duty to the servant, or is a fellow servant of the latter engaged in a common employment, many incongruous decisions have been rendered.

On this topic a rational distinction would seem to be that when the employee's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not entrusted with the master's duty to his fellow-servant, and the master is not responsible to his fellow-servant for his fault,¹ but that if the master has cast a duty of inspection or repair upon an

¹ Accord: *Sage v. B. & O. R. R.*, 219 Pa. 129 (1907), engineer failing to report bad condition of his locomotive; see also, *Ehni v. Tube Co.*, 203 Pa. 186 (1902), p. 190. "It is the duty of the employee to discover and report any defect which may arise by reason or in course of the use made of the material. He has means of observing and ascertaining any such defect which the employer does not possess."

This, of course, only applies where the defect is one readily observable by the workman while using the appliance. *McNeil v. Crucible Co.*, 213 Pa. 333 (1906); *Wilson v. Union Casting Co.*, 223 Pa. 167 (1909).

employee who is not engaged in using the apparatus in a common employment with his fellow-servant, then that employee in that duty represents the master, and the master is chargeable with his default. This distinction is noticeable in *McAndrews v. Burns*, 10 Vroom, 117; *Smith v. Oxford Iron Co.*, 13 Id. 467; *Collyer v. Pennsylvania Railroad Co.*, 20 Id. 59; *Ross v. Walker*, 21 Atl. Rep. 157; *Moynihan v. The Hills Co.*, 146 Mass. 586; *Daley v. Boston and Albany Railroad Co.*, 147 Id. 101, and many other cases.

Applying this principle to the case in hand, it is manifest that Schau, the storekeeper, who was charged with the duty of seeing that the apparatus was in good condition before it was delivered to the stevedores for use, but was not himself to be engaged in using it, was in that service the representative of the defendant, and was not serving in a common employment with the deceased. As the evidence tended to show that he had not carefully performed this duty, and that the accident had thence resulted, the plaintiff could not be nonsuited for want of proof of negligence chargeable to the defendant.

That the case did not present such indubitable proof of negligence on the part of the deceased as to justify a nonsuit, is, I think, too clear for discussion.

The nonsuit was rightly refused.²

² *Accord: Finnerty v. Burnham*, 205 Pa. 305 (1903); *Shine v. Morgan Smith Co.*, 219 Pa. 145 (1909). So where appliances are withdrawn for repair the master is liable for a negligent inspection whereby they are reissued for use in an unfit and dangerous condition. *P. & N. Y. Canal, etc., Co. v. Mason*, 109 Pa. 206 (1885); *Marsh v. R. R.*, 205 Pa. 558 (1903). Nor is the master the less bound to inspect appliances not owned by him but which he temporarily borrows or hires for the use of his employees, *Sharpley v. Wright*, 205 Pa. 253 (1903), though he is not bound to inspect either the premises when the work is to be done if he neither owns nor controls it, *ib.* p. 258; *Connolly v. Firth*, 190 Pa. 553 (1899), or an appliance of him on whose premises the work is to be performed unless he adopts it and furnishes it to his employees for use in his business, even though if unfit it may endanger his employees' safety. *Hughes v. Leonard*, 199 Pa. 123 (1901).

The master is not excused from inspection by the fact that the appliance is purchased from a reputable manufacturer—*Finnerty v. Burnham*, *supra*; *Morton v. Ry. Co.*, 81 Mich. 423 (1890); *Roughan v. Co.*, 161 Mass. 24 (1894)—and the existence of structural defects, patent to a careful inspection, is proof of the breach of the master's duty, *ib.*; and this is so though the manufacturer warrants the appliance as safe and fit for the use to which they are put, though in such case the master may recover over against the manufacturer the damages he is forced to pay his employee. *Boston Woven Hose Co. v. Kendall*, 178 Mass. 232 (1901); *Mowbray v. Merryweather*, L. R. 1905, 2 Q. B. 640.

Where, however, the structure or appliance supplied, repaired or inspected is of such a nature that its sufficiency and safety can only be determined by an expert, the master, if neither he himself nor any of his subordinates have the requisite skill, need not make an inspection which would teach him nothing, *Deane v. Co.*, 5 Colo. App. 521 (1895); nor is he bound in search of probable defects to tear to pieces or submit an article or subject to chemical analysis material bought of a reputable manufacturer. *Richmond, etc., R. R. v. Elliott*, 149 U. S. 266 (1893); *Ballard v. Hilchock Co.*, 51 Hun, 188 (N. Y., 1889); *Indianapolis, etc., R. R. v. Birney*, 91 Ill. 474 (1879), but may commit the inspection to experts making a business thereof. *Young v. Mason Stable Co.*, 193 N. Y. 188 (1908); *Sack v. Ralston*, 220 Pa. 216 (1908), elevators inspected

UNION PACIFIC RAILWAY COMPANY *v.* DANIELS.*Supreme Court of the United States, 1894. 152 U. S. 684.*

FULLER, C. J.: The evidence tended to show that Daniels was a brakeman in the employment of the company, and in the discharge of his duties as such, April 3, 1887, on a freight train made up at Green River, and running thence westward; that he was ordered on top of the train to set the brakes at different points going down a long hill, and was so engaged when the train was suddenly wrecked, and he was severely injured; that a wheel on one of the cars had an old crack in it, some twelve inches long, which rendered it unsafe; that the wheel gave way by reason of the fracture and thus the disaster occurred; and that, although the crack, being old, was filled with greasy dirt and rust, it could have been detected without difficulty if the wheel had been properly examined at Green River, which was an inspecting station, at which trains were made up.

Upon the inferences properly deducible from such evidence, the rule applied, which requires of the master the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections, tests, and examinations at the proper intervals. As observed in *Hough v. Railroad Co.*, 100 U. S. 213, 218, the duty of a railroad company "in that respect to its employees is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees"; and the company "cannot in respect of such matters interpose between it and the servant, who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation."

by inspectors of insurance company; *Service v. Shoneman*, 196 Pa. 63 (1901); *Cavanaugh v. Avoca Coal Co.*, 222 Pa. 150 (1908), boilers similarly inspected.

But the master is liable if he fails to have it so inspected, *McGuigan v. Beatty*, 186 Pa. 329 (1898), or if he has it inspected by his own employees and the inspection be carelessly made, *Corn Products Co. v. King*, 168 Fed. 892 (C. C. A. 7th Circ., 1909), or if his manager or superintendent knows, notwithstanding a favorable report of an expert inspector, that it is in fact defective, *Hollis v. U. S. Glass Co.*, 226 Pa. 332 (1910); but see *Devlin v. Smith*, 89 N. Y. 470 (1882), which holds that a master painter may, without procuring outside expert inspection, rely upon the sufficiency of a high scaffolding built by reputable and experienced scaffold builders. *Butler v. Townsend*, 126 N. Y. 105 (1891); *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273 (1892); but this does not apply where the structure (a railroad bridge on a leased line) is permanent and the company has in its employment engineers competent to determine its sufficiency by a reasonable inspection, *Vosburgh v. R. R.*, 94 N. Y. 374 (1884).

A Government inspection designed to secure the quality of the finished article, will not relieve the master from the duty to inspect the material used, to see that it is free from dangerous defects which he is perfectly able to observe and appreciate, *O'Connor v. Armour Packing Co.*, 158 Fed. 241 (1908), 15 L. R. A., N. S. 812, with note; meat passed by Government inspector, so diseased as to expose operatives to infection.

There can be no doubt that under the circumstances of the case at bar the duty rested upon the company to see to it, at this inspecting station, that the wheels of the cars in this freight train, which was about to be drawn out upon the road, were in safe and proper condition, and this duty could not be delegated so as to exonerate the company from liability to its servants for injuries resulting from the omission to perform that duty or through its negligent performance.¹

The rulings of the court in giving the eighth and ninth instructions for plaintiff, and in refusing to give the sixth and seventh instructions requested on the part of defendant, were not, therefore, open to the exceptions taken.² The sufficiency of the number of

¹ *Accord: Ford v. Fitchburg R. R.*, 110 Mass. 240 (1872); *McDonald v. Standard Oil Co.*, 69 N. J. L. 445 (1903), *semble*; *Bailey v. R. R.*, 139 N. Y. 302 (1893), and cases cited in *Labatt on Master and Servant*, Vol. II, § 568 and notes.

Contra, P. & R. R. v. Hughes, 119 Pa. 301 (1888), *semble*, in which it was said, p. 314, that "a brakeman and car inspector" (whose duty it was to inspect the cars while in use and *en route*) "are in the same circle of employment," and that while "it is the duty of the company to provide suitable persons, in sufficient numbers, at proper places, with reasonable opportunities" ("and facilities") "to accomplish the work." *Accord: Crawford v. United Ry. Co.*, 101 Md. 402 (1905), p. 417, the performance of the duty of inspection "must necessarily be committed in detail to the employees" for whose negligent performance of the work entrusted to them the company is not liable to a fellow employe unless it "knows or by ordinary diligence ought to know, of the defective manner in which the inspection was conducted," and see, *accord, Martin v. R. R.*, 220 Pa. 603 (1901), p. 609, and *Dorner v. Canal Co.*, 164 Pa. 17 (1894), requiring similar system of inspection of cars received for carriage from connecting lines. See *Mackin v. R. R.*, 135 Mass. 201 (1883). And this though they are being used in the private yard of a shipper. *Elkins v. R. R.*, 171 Pa. 121 (1895), but a consignee is not bound to inspect cars before sending his servants to unload them. *McMullen v. Carnegie*, 158 Pa. 518 (1893), but see *P. & R. R. v. Huber*, 128 Pa. 63 (1889); *Mensch v. R. R.*, 150 Pa. 598 (1892), p. 610, and *McConnell v. R. R.*, 223 Pa. 442 (1909).

While many Pennsylvania cases assert that it is the duty of employers, other than railroad companies, to be as alert in inspecting his machinery and repairing defects as he is in making a proper selection of new machinery, and that this duty is a direct and continuing one, from which nothing but performance will relieve him, *Weller v. Co.*, 28 Pa. S. C. 102 (1905), p. 103 and cases cited—in every case there was a total failure to provide for the inspection of the machinery in question; the liability of a master, who has provided a suitable system of inspection, for the operative negligence of a competent subordinate employed to carry it out, appears never to have been determined.

Since the duty arises not out of ownership of the car or other tool or appliance, but out of its use as an instrumentality of the business, a railroad company or other master is liable for an improper inspection of a car received for carriage from a connecting line, *B. & O. R. R. v. Mackey*, 157 U. S. (1894) or of a tool or appliance temporarily loaned to it for the use of its servants. *Sharpley v. Wright*, 205 Pa. 253 (1903); *Woodward Iron Co. v. Cook*, 124 Ala. 351 (1899).

² The plaintiff's eighth and ninth instruction were to the effect a negligent failure by the car inspector to discover the crack in the wheel was negligence for which the defendant was liable, and that it is no defense that the company used proper care and diligence in selecting such inspector. The sixth and seventh instructions asked by defendant were to the effect that the company was not liable unless there was negligence in selecting or retaining an incompetent inspector.

inspectors and their competency furnished no defense, nor the contrary, the ground of recovery, though some of the averments of the complaint may have indicated that cause of action.

The trial court charged the jury, among other things, that the defendant was required to "use a reasonable care, consistent with the nature and extent of the business, and provide proper machinery; but it is not responsible for hidden defects, which could not have been discovered by a careful inspection"; that "the burden of proof is in this case, as in all other cases like it, upon the plaintiff, to make out his case to your satisfaction. The law is well settled, both here and in England, our mother country, that the employer should adopt such suitable implements and means to carry on the business as are proper for that purpose; and where there are injuries to its servants, or its workmen, and they happen by reason of improper or defective machinery or appliances in the prosecution or carrying on the work which they are employed to render, the employer is liable, provided he knew, or might have known, by the exercise of reasonable skill, that the apparatus was unsafe and defective. If, by reasonable and ordinary care and prudence, the master may know of the defect in the machinery which he operates, it is his duty to keep advised of its condition, and not needlessly expose his servants to peril or danger"; that "in employing the plaintiff, the corporation defendant did not become an insurer of his life or his safety. The servant takes the ordinary risks of his employment. The duty of the defendant towards him was the exercise of reasonable care in furnishing and keeping its machinery and appliances, about which he is required to perform his work, in a reasonably safe condition. It was the defendant's duty also to use like ordinary care in selecting competent fellow-servants, and in a sufficient number, to insure that the work would be safely done; and this duty was discharged by the defendant if the care disclosed by it in these several matters accorded with that reasonable skill and prudence and care which careful, prudent men, engaged in the same kind of business, ordinarily exercise."

And that, "as between employer and employee, between master and servant, as in this case, negligence on the part of the former is not proven, or to be inferred, simply from the existence or occurrence of the accident which caused the injury complained of."

The defendant had no reason to complain because the fourth and fifth instructions, which it asked, were not otherwise given than as contained in the views thus expressed by the court.

Judgment affirmed.

(d) Miscellaneous Duties.

FINCH, J., in *Scarff v. Metcalf et al.*, 107 N. Y. 211 (1887) p. 215:

The maritime law is sensitive to the rights of seamen and sedulous for their protection. When sick or injured they are entitled to be cared for and cured at the expense of the ship, and not to be turned adrift in strange lands without adequate provision. They are

exposed to hardship, confronted with dangers, and grow occasionally reckless by their very familiarity with peril. The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited. That which on land would be contributory negligence the maritime law scarcely recognizes and readily excuses, (*The City of Alexandria*, 17 Fed. Rep. 390, 395), and in many ways throws its protection around the seaman. When he falls sick or suffers injury the owners owe to him the duty of rendering such care and medical aid as circumstances permit, and in the performance of that duty the master stands as the agent and representative of the owners and his negligence is theirs. (*Petersen v. Swan*, 50 N. Y. Supr. Ct. 46; *The City of Alexandria*, *supra*; *Reed v. Canfield*, 1 Sumner, 195; *Harden v. Gordon*, 2 Mason, 541, 543.)¹ The last cited case considers the effect of the act of Congress requiring the ship to be supplied with a suitable medicine chest, and holds that such requirement does not subvert the general duty imposed upon the owners by the maritime law, but merely regulates a single detail of its exercise. This duty the owners who remain at home and do not sail upon the ship can only perform, beyond supplying the medicine chest, through the master, who becomes their agent for its performance. The mate, although an officer, is a seaman. (*Holt v. Cummings*, 102 Pa. 212; *Ocean Spray*, 4 Sawyer, 105; *Minna*, 11 Fed. 759.) While both he and the master are servants of the owner and so fellow-servants, they are not such in respect to the owners' duty to the seamen which the master performs in their behalf and as their representative, and the contention in this case that the master's neglect was that of a fellow-servant cannot prevail.

Where the duty of the owner to the seaman is performed, the cost of nursing and medical attention falls upon the ship,² (*North America*, 5 Ben., 486), and that has been ruled even where the patient had been removed to his own house. (*Holt v. Cummings*, *supra*.) But where the duty is not performed, and the seaman suffers injury from the neglect, the ship, in a proceeding *in rem.*, and the owners in a suit against them, are liable for the damages suffered. (*Couch v. Steel*, 77 Eng. Com. Law. Rep. 402; *Brown v. Overton*, 1 Sprague, 463; *Mosely v. Scott*, 14 Am. Law Reg. 599; *Tomlinson v. Hewett*, 2 Sawyer, 278; *Petersen v. Swan*, *supra*.) These principles settle the liability of Metcalf, unless he is discharged by force of his arrangement with the master, to which attention must now be directed.

ELLISON, J., in *Hyatt v. The Hannibal & St. Joseph Ry. Co.*, Court of Appeals of Missouri, 19 Mo. App. 287 (1885), p. 297:

¹ If the necessary medical attention cannot be procured on board, the ship must put into a port if there is one within reasonable distance. *The Iroquois*, 194 U. S. 240 (1903); *The Fullerton*, 167 Fed. 1 (1908).

² No similar liability to pay for medical attendance upon an ill or injured servant is recognized by the Common Law. See cases cited *Ohio & Miss. R. R. v. Early*, note 2, *post*, p. 440.

This is not an ordinary hiring, like as if one should hire another to go into the timber to get out wood or logs, as was said in the argument. In such case no one would contend there was any obligation on the hirer to provide fire. But here is an extraordinary emergency. A storm has blockaded defendant's track, so as to stop the running of trains, so as to catch their passenger trains, loaded with passengers, in the drift. Men are needed to work, day and night, without regard to the intense severity of the weather; needed to work at a place where there was no habitation, and where there was nothing with which fire could be made. The plaintiff, having been at work during the day, and, noticing it was again storming and the weather growing yet colder, and, realizing that to go on to a point that night, where there was no means to provide a fire, he might possibly perish with cold, refuses to go, makes known his fears to the general superintendent of defendant's railway, and receives from him assurance that this peril will be provided against. Relying on such assurance, he is led into the situation he would have avoided, but for the assurance, the promise not being kept, and the plaintiff frozen in consequence.

It is not the duty of a master to a servant to provide him with shelter, ordinarily, but railroads have been built, and are perhaps now being constructed, across sterile, uninhabited and uninhabitable countries, or sections of country. If a servant, realizing that he is being sent to perform labor at such a place, refuses to go on account of the peril to his health or life, receives assurance that shelter will be provided when needed, and under such assurance goes, or permits himself to be taken, to a point, perhaps hundreds of miles from a habitation, and there, in consequence of the noncompliance of his master, he perishes, or is bodily injured, is not the master liable, and liable to an action of tort?¹ Illustrations might be multiplied, but they will readily suggest themselves without being set out here. In my judgment, there was no necessity for plaintiff's alleging the promise in the form of a contract or agreement to provide fire. I think it was enough that plaintiff, after working all day for the price of a dollar and a half, as agreed, found he was expected to proceed that night, some nine miles up the track from Cameron, to a point where no shelter, fire or fuel could be had; that a storm then beginning, the weather growing more intensely cold, and giving evidence of an approaching unprecedented cold night, had a right, before proceeding further, to ask and accept assurances from his employer that he would be provided with protection.

There is no doubt but that plaintiff could have legally quit defendant's service on the evening he received the assurances as to the fire.

Says the court in *Hough v. Ry. Co.* (100 U. S. 225), quoting from Judge Cooley: "If the servant, having the right to abandon the service because it is dangerous, refrains from doing so in conse-

¹ *Accord: Clifford v. R. R.*, 9 Colo. 333 (1886), facts substantially as stated above, save that by the contract of employment the master was bound to furnish "good and suitable board and lodging", held sufficient to show a cause of action based on the defendant's negligence.

quence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume the risks."

It was the plaintiff's duty to defendant to comply with these assurances, as much as it would have been to have protected him from an embankment, or from dangerously defective machinery; and it is as much liable in tort in the one case as the other.²

FIELD, J., charging the jury in *U. S. v. Knowles*, U. S. District Court, Northern District of California, 4 Sawyer, 517 (1864), p. 520:

Now, in the case of a person falling overboard from a ship at sea, whether passenger or seaman, when he is not killed by the fall, there is no question as to the duty of the commander. He is bound, both by law and by contract, to do everything consistent with the safety of the ship and of the passengers and crew, necessary to rescue the person overboard, and for that purpose to stop the vessel, lower the boats, and throw to him such buoys or other articles which can be readily obtained, that may serve to support him in the water until he is reached by the boats and saved. No matter what delay in the voyage may be occasioned, or what expense to the owners may be incurred, nothing will excuse the commander for any omission to take these steps to save the person overboard, provided they can be taken with a due regard to the safety of the ship and others remaining on board. Subject to this condition, every person at sea, whether passenger or seaman, has a right to all reasonable efforts of the commander of the vessel for his rescue, in case he should by accident fall or be thrown overboard. Any neglect to make such efforts would be criminal, and if allowed by the loss of the person overboard, when by them he might have been saved, the commander would be guilty of manslaughter, and might be indicted and punished for that offense.¹

² So in *Shoemaker v. R. R.*, 46 Minn. 39 (1891), it was held a complaint averring that the defendant having sent the plaintiff, during extremely cold weather, to do repair work at an isolated point, had failed to give him means of transportation home, so forcing him to walk nine miles to the nearest town, and that the resulting exposure had seriously impaired his health, set forth a good cause of action; compare *King v. R. R.*, 23 R. I. 583 (1902), and see 56 Am. L. Reg. 238, n. 32.

So a master appears to be guilty of manslaughter if he fail to provide necessities of life to servant who from youth, mental incapacity, or physical or mental coercion by the master are unable or prevented from leaving his premises and seeking them elsewhere. *R. v. Ridley*, 2 Camp, 650 (1811), *semble*, and one imprisoning another must feed him. *R. v. Edwards*, 8 C. & P. 611 (1838).

¹ So in *Raasch v. Elite Laundry Co.*, 98 Minn. 357 (1906), it was held that where a servant is caught, whether by accident or his own fault, in dangerous moving machinery, it is the master's duty to take reasonable steps to

MCCABE, J., in *Ohio & Mississippi Railway Company v. Early*, *Adm.*, 141 Ind. 73 (1894), p. 81:

While a railroad company is under no general legal obligation to furnish an employe who may receive injuries, while engaged in the service of the company, with medical or surgical assistance,¹ yet where a day laborer or employe has, by unforeseen accident to him, while engaged in the line of his duty as such employe, been rendered helpless, the dictates of humanity, duty and fair dealing would seem to demand that it should furnish medical assistance.

Of course, this duty could not rest upon the master in ordinary cases, in the absence of a contract to do so, but should rest upon him only in extraordinary cases, where immediate medical or surgical assistance is imperatively required to save life or avoid further serious bodily injury. This duty on the railroad company only arises out of strict necessity and urgent exigency, where immediate attention thereto is demanded in order to save life or prevent great injury. The duty arises with the emergency and with it expires.² *Terre Haute, etc., R. R. Co. v. McMurray*, 98 Ind. 358, and authorities there cited.

This duty does not clothe the master with the power to dictate to the injured servant what particular physician or surgeon shall treat him, nor does it deprive such injured servant of the right of making a conscious and deliberate choice while in the possession of his mental faculties, of the time, place, and person by whom,

extricate the servant in order that his injuries may not be unnecessarily increased. *Contra, Allen v. Hickson*, 111 Ga. 460 (1900), and see *Grizzle v. Frost*, *post*, p. 441.

In the same case it is also said that a master employing servants in the operation of dangerous machinery is bound to take reasonable precautions, as by putting the machinery in charge of one having adequate knowledge how to operate and stop it and by properly instructing the operatives how to shut off the power and providing them with tools for the purpose, to provide for extricating, without undue delay, a servant caught in the machinery. *Contra, Stager v. Laundry Co.*, 38 Oregon, 480 (1901), and compare *In re Pacific Mail S. S. Co.* 130 Fed. 76 (C. C. A. 9th Circ., 1904), steamship company liable by maritime law for failing to employ a crew capable of efficiently operating the lifeboats after a collision.

¹*Accord: Wennall v. Adney*, 3 B. & P. 247 (Eng., 1802), *semble*. As to the master's liability for failure to provide proper food and lodging to a servant, *sui juris*, mentally competent, and neither confined or otherwise prevented by the master from seeking these necessities of life elsewhere, see *R. v. Smith*, 10 Cox. C. C. 82 (1865); *R. v. Ridley*, 2 Camp. 650 (1811), and 56 Am. L. Reg., pp. 237 to 241.

²So the master is at most only bound to care for the servant till he can bring him to some place where the latter can procure medical assistance. The master is not bound to provide and pay for medical assistance. If the servant is indigent "it is more advantageous to the servant that the legal claim for assistance shall be upon the parish officers" (or other public officers charged with the care of the indigent sick) "rather than against the master." Heath, J., *Wennall v. Adney*, 3 B. & P., p. 253; and it would be imposing an overly onerous burden upon persons obliged, by the needs of their trade, to employ servants to require them not only to lose their services while ill, but also to bear the expense of curing them, *ib.*, p. 254. So it has been held that a general manager of a manufacturing corporation has no authority to bind it by employing, in its name, a surgeon to treat an injured operative. *Swasey v. Union Co.*, 42 Conn. 556 (1875); and see 56 Am. L. Reg. 242 and notes.

when and where he will be treated. And if the master, yielding to such right, complies with the request to be so treated, and at the same time promptly places before him ample medical and surgical assistance, ready to be rendered to meet the emergency which he declines, then such emergency has ceased, and the duty with it. And if the choice thus made in the conscious exercise of his own free will turns out to be a mistake, the company is not liable, because the duty ceased with the expiration of the emergency.³

(c) Duty to Warn Minor or Inexperienced Servant.

GRIZZLE v. FROST.

Queen's Bench, 1863. 3 *Foster & Finlanson*, 622.

The plaintiff, a young girl of under sixteen, who had never been in such employment before, was set by the defendants, rope manufacturers, to watch the cans beneath the carding machines, and as soon as they were filled with the carded hemp to remove them and replace them with empty cans. There was no danger in doing this, but she swore that a few days before the accident the foreman told her to pick up the hemp which fell from the machine and to put it between the rollers while they were in motion in a way which the foreman showed her and which brought her fingers very close to the rollers. On the contrary, the foreman swore that he had expressly told her not to do this. While doing, she said, exactly as she had been thus directed, her hand was caught between the revolving rollers. She screamed, but owing to the noise of the other machines her screams were not heard at once. When she was heard and the foreman came to her aid, it took some time to stop the machine. This delay it appeared was due to the absence of a striking gear by which the band, by means of which power was communicated, could be thrown off the pulley. In this interval her arm was drawn between the rollers and so crushed that it was found necessary to amputate it.

COCKBURN, C. J.: The absence of proper means for stopping the machine could not alone sustain the action, unless there was negligence on the part of the defendants or for which they are liable, by which the accident was originally caused; for the delay in stopping the machine of course could only have aggravated the injury and could not have *caused* it. The question therefore is, whether the accident was caused by the negligence of the defendants, or for which they are liable?

The foreman was put by them in their place to employ this young person in and about the dangerous machinery of which she was quite ignorant, and I think any negligence of his in the matter would be negligence for which they would be responsible.

³ *Accord*: *Shaw v. R. R.*, 103 Minn. 8 (1907); but see *contra*, *King v. R. R.*, 23 R. I. 583 (1902).

There is evidence both of negative and positive negligence on his part—negative, in not giving the girl proper instructions as to the use of the machine—*positive* in expressly directing her to do the very thing she had done, and which it was admitted was dangerous—*so* dangerous, indeed, that the case for the defense was, that she had been told *not* to do it.¹

Now if either of those grounds of negligence are sustained the defendants would be liable; for I am of opinion that if the owners of dangerous machinery, by their foreman, employ a young person about it quite inexperienced in its use, either without proper directions as to its use or with directions which are improper and which are likely to lead to danger, of which *the* young person is not aware, and of which they *are* aware; as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery.²

Verdict for the plaintiff, £150.

WAGNER v. JAYNE CHEMICAL COMPANY.

Supreme Court of Pennsylvania, 1892. 147 Pa. 475.

HEYDRICK, J.: The several assignments of error in this case, except the fourth, raise the question whether there was any evidence which ought to have been submitted to the jury.

According to the appellant's statement, it is engaged in the manufacture of a dye stuff called dinitro-benzole, which is made by putting liquid nitro-benzole into a receiver, and pouring nitric acid and sulphuric acid into it and mixing them, in which process heat is produced by chemical action. The liquid is then allowed to cool, when the dinitro-benzole settles to the bottom, and is separated from the acids as far as practicable, and then subjected to another process in which heat is mechanically applied.

The testimony on the part of the plaintiff, if believed, showed that he was a common laborer; that he had been employed by

¹ Compare *Raasch v. Elite Laundry*, 98 Minn. 357 (1906).

² "In the case of young persons, it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate and to which they should not be exposed. The duty in such cases to warn and instruct grows naturally of the ignorance or inexperience of the employee and it does not extend to those who are of mature years and who are familiar with the employment and its risks"—*Rummell v. Dilworth*, 131 Pa. 509 (1889), per Williams, J., p. 520; and see *Labatt, Master and Servant*, §247 and notes. There is no duty to warn even minors of the ordinary risks and dangers of his occupation which he actually knows or which are obvious to one of his age and capacity. *Truntle v. North Star Co.*, 57 Minn. 52 (1894).

But the master's duty is not satisfied by merely giving to the minor servant warning of the danger, he must instruct him as to how to avoid it. *Streetam v. Trexler Co.*, 13 Pa. S. C. 219 (1900). The doctrine peculiar to Pennsylvania that there is a presumption of incapacity to exercise care for self-protection before, and of capacity after, the age of fourteen applies only to contributory negligence, *Nagle v. R. R.*, 88 Pa. 35 (1879); *Kehler v. Schwenk*, 144 Pa. 348 (1891), and not to the question of the master's duty to instruct minor servants.

the defendant occasionally, prior to the injury complained of, to do such work outside of the establishment as unloading boats, hauling barrels and digging; that on the 29th of August, 1889, he was re-employed and set to work at some common labor as before, but soon after ordered to do some work in connection with the process of making dinitro-benzole; that poisonous fumes were evolved by that process, which he inhaled; that, experiencing discomfort therefrom, he left the work, declaring that he "could not stand it;" that the defendant's superintendent assured him that the fumes would not hurt him, and ordered him to return to his work; that, relying upon the superintendent's assurance, he obeyed his order, but in a few hours became so sick that he was obliged to go home, and was thereafter under a physician's care several months; and that he had no previous knowledge of the dangers to which he was exposed, and was not warned of them by his employer. The testimony of his physician, as well as that of three experts called by him, strongly tended to show that his sickness was the result of inhaling the fumes evolved in the manufacture of dinitro-benzole. There was also testimony tending to show that the defendant knew that these fumes were poisonous, and had previously so warned at least one other workman.

It is a well-settled rule of law that an employe will be deemed to have assumed all the risks naturally and reasonably incident to his employment, and to have notice of all risks which, to a person of his experience and understanding, are, or ought to be, open and obvious. This is a reasonable rule, for, when a man seeks employment in any particular department, of either industrial or intellectual activity, he thereby represents himself to be qualified by the necessary experience or learning, as the case may be, for the performance of the duties which he proposes to assume, and such experience or learning necessarily brings a knowledge of the ordinary risks of the employment.¹ Thus, one who holds himself out as a physician is deemed to thereby represent that he possesses such learning and skill as to reasonably qualify him for the duties of his profession; and that learning will teach him the danger of exposure to contagious and infectious diseases. But when the reason of the rule fails, the rule itself ceases to have any application. And therefore, while the physician would have no ground of complaint if his health should be permanently impaired by reason of exposure at the call of a patient, to a contagious or infectious disease, he might recover damages for the slightest injury suffered in consequence of a defect in the floor of the house which he was invited to enter, unknown to him but which was known or ought to have been known to his patron; and this because there is nothing in the science of medicine, in which he professes to be learned, to affect him with notice of the latter danger. Neither is there anything in the employment of a common laborer that presupposes

¹ "One of apparent maturity and average capacity, who solicits a particular employment may be presumed to be fit" for it, unless the master has notice of his inexperience. *Louisville, etc., R. R. v. Miller*, 104 Fed. 124 (C. A. Circ., 1900), per Lurton, J.

any scientific knowledge, such as a knowledge of the properties of acids, or that poisonous fumes are likely to be evolved in a manufacturing process in which nitric acid is used; and for that reason, the law does not presume that such laborer either possesses or professes such knowledge. And, although some of the work required to be done in the manufacture of dinitro-benzole may be mere drudgery, it cannot be said to be of such ordinary character in its surroundings as to justify a presumption that a common laborer has, by experience, acquired a knowledge of its attendant dangers. Without some such previous knowledge, either scientific or experimental, the dangers, if any there be, of exposure to the fumes of nitric acid would not be open and obvious, and the laborer could not, with propriety, be deemed to have assumed such risks unknown to him as are naturally and reasonably incident to his employment. (*Rummell v. Dilworth*, 111 Pa. 343.)

On the other hand, it is equally well settled that an employer is bound to exercise reasonable precaution against injury to his employes while they are in his service and obeying his orders. Not only must he provide suitable implements and means with which to carry on the business which he sets them to do, but he must warn them of all the dangers to which they will be exposed in the course of their employment, except those which the employe may be deemed to have foreseen as necessarily incidental to the employment in which he engages, or which may be open and obvious to a person of his experience and understanding, and except, also, such as the employer cannot be deemed to have foreseen. And the employer will be presumed to be familiar with the dangers, latent as well as patent, ordinarily accompanying the business in which he is engaged. Authorities upon these points may be found in great abundance in the notes to §§ 185 to 203 of *Shearman and Redfield on Negligence*.

Keeping these principles in mind, it will be seen that the learned court below could not have given binding instructions to the jury to find for the defendant, without committing grave error. There was testimony of witnesses, apparently entitled to the highest respect, tending to show, on the one hand, that the fumes of nitric acid are poisonous, and, on the other hand, that they are not. That the question thus raised was, if material, properly submitted to the jury cannot be doubted. That it was material is shown by the sharpness of the contention over it, for, if learned gentlemen, who have made it the subject of special study and investigation, cannot agree whether it be injurious to the human system to inhale such fumes, it cannot be that the danger of exposure to them is so open and obvious to a common laborer that he should be deemed to have voluntarily assumed the risk as one incident to his employment. There was also evidence, possibly open to criticism, but which could not be withheld from the jury, tending to show that the defendant had knowledge of the dangerous character of the nitric acid fumes.

The evidence of contributory negligence, coming from the plaintiff, was not sufficient to justify the court in directing a verdict

against him. It does not appear that when he quit work, saying, "I can't stand this," he knew, or had reason to believe, that the fumes would do him permanent injury. When the superintendent assured him that they would not hurt him, he had a right to rely on that assurance and return to his work. (*Patterson v. R. R. Co.*, 76 Pa. 393.) In *Beitenmiller v. Brewing Co.*, 22 W. N. 33, upon which the defendant relies, the plaintiff knew the danger to which he was exposed; he had tested it, and retreated from it. The superintendent did not tell him that ammonia would not hurt him, but when directing him to return to work, impliedly admitted the danger by saying that the ammonia was not then so bad. The statement was not true, and the moment the plaintiff entered the room that fact must have been so obvious that it could not escape the attention of the duller person, and therefore, when he continued his work, he assumed the risk.

The fact that the fumes of nitric acid may be perceptible to the senses is conclusive of nothing. The court could not say, as matter of law, that every odor is a warning of danger.

The judgment is affirmed.³

³ Accord: *McCray v. Sterling Varnish Co.*, 7 Pa. S. C. 610 (1898); *Fox v. Peninsular Works*, 84 Mich. 676 (1891); *Rillston v. Mather*, 156 U. S. 391 (1895). So a master is liable to a house servant who has not been told of the existence of contagious disease in the household. *Kleegel v. Aitkin*, 94 Wis. 432 (1896), and an inexperienced nurse is entitled to instruction as to the methods by which she can escape infection. *Hewett v. Hospital*, 73 N. H. 556 (1906).

So, if conditions are changed, during the servant's employment, it is the master's duty to warn the servant of the dangers created thereby. *Burns v. Vesta Coal Co.*, 223 Pa. 476 (1909).

While the master is bound to warn the servant of all abnormal and unusual risks of which he knows, or which, by the exercise of care reasonably to be demanded of one carrying on his sort of business, he could ascertain (*Hysell v. Swift*, 67 Mo. App. 39 [1899]), but which the servant cannot be expected to perceive or, if he perceives them, appreciate. *Goodale v. York*, 74 N. H. 454 (1908), and cases given in the notes to § 240, *Labatt on Master and Servant*; but not of dangers obvious to the servant and capable of appreciation by one of his apparent capacity, *Labatt on Master and Servant*, § 238 and notes.

There is no duty to give instructions as to every contingency which may by any possibility arise. *Gilmore v. Paper Co.*, 169 Mass. 471 (1897). A manufacturer is not bound to instruct his operatives how to save themselves in case of fire, *Kleigel v. Aitkin*, *supra*; but an employer is bound to warn his employees of even transitory dangers which the master ought reasonably to anticipate, *Lord v. R. R.*, 74 N. H. 39 (1906).

The master is equally bound to warn or instruct a servant who is directed by one placed in authority over him to leave his general employment and engage in work unfamiliar to him. *Cook v. R. R.*, 34 Minn. 45 (1885); *Reed v. Stockmyer*, 74 Fed. 186 (C. C. A. Circ., 1896); *Stapleton v. Citizens' Trac. Co.*, 5 Pa. S. C. 253 (1897). A master is liable to a servant injured by the unskillfulness of a fellow servant set to operate an intricate machine without adequate instructions, *Lebbering v. Struthers*, 157 Pa. 312 (1893).

As to the relation between the master's duty to warn and instruct inexperienced servants and the (so-called) defense of assumption of risk see *Northwestern, etc., Co. v. Danielson*, 57 Fed. 915 (C. C. A. Circ., 1893); *Bannon v. Lutz*, 158 Pa. 166 (1893); *Bohn, etc., Co. v. Erickson*, 55 Fed. 943 (C. C. A. 8th Circ., 1893); *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572 (1869); *U. S. Rolling Stock Co.*, 116 Ill. 100 (1886), and other cases cited in the notes to § 242, *Labatt on Master and Servant*.

(f) **Negligence of Fellow-servant Concurring With Breach of Employer's Duty.**

PAULMIER, ADM'R OF CARHART, *v.* ERIE R. R. CO.

Supreme Court of New Jersey, 1870. 34 N. J. L. Rep. 151.

This was a suit brought by an administrator, to recover damages for the death of the intestate, occasioned by the negligence of the defendants.

It appeared at the trial in the Hudson Circuit that the railroad of the defendants ran through their depot yard at Jersey City, and thence was projected over the water on trestle work for about two hundred and fifteen feet. From this extension of the track, the cars were unloaded into boats.

On the occasion in question, this part of the track gave way under the weight of the engine, which was thereby thrown into the water. The intestate was fireman on the engine, and was drowned.

The defendants admitted that this trestle work was not safe for locomotives. Their defense was, that it was not built for the engines to run upon; that the orders in the depot yard were, that no engine should be run upon it, and that the practice was to push the loaded cars out over the water by means of other cars interposed between them and the locomotive. There was some evidence to show that the engineer in charge of the locomotive in question had orders not to permit his engine to go beyond the fast land. There was nothing in the case which indicated that the intestate had any knowledge of such orders.

There was a verdict for plaintiff, and a rule to show cause, etc.

BEASLEY, C. J.:¹ But, in the second place, it was said that even on the assumption of the presence of negligence on the part of the defendants, there was contributory negligence on the other side, and that, therefore, there should be no recovery. The negligence thus invoked was not that of the intestate, but that of one of his fellow servants. The intestate was the fireman on the locomotive, and it is not asserted that he knew of the insecurity of the trestle work, or of the orders not to go upon it. But it is claimed that the engineer in charge had received such orders, and that he disobeyed them, and that, by his so doing, the accident occurred. I shall not go aside to inquire whether the disobedience of such an order would have the effect of depriving the next of kin of this engineer of a right of action against the company, though it is obvious that the disobedience of an order must often be quite a different thing from the legal notion of contributory negligence, which always

¹ Those portions of the opinion are omitted which decide that the company was bound not only to order the engineers not to run their engines on to the trestle, but also to notify them of its dangerous condition and that the judgment must be set aside because of excess in the damages awarded.

involves the circumstance of knowingly exposing the person to the hazard from which the damage results; for whatever may be thought of the position of the engineer, and on the assumption that a right of suit, on account of his misconduct, does not exist in his behalf, still, in my apprehension, the foundation of this action remains undisturbed. The jury has found the negligence of the defendants, and if we add to this, negligence of the engineer, we reach the conclusion that the injury to the intestate was the result of these two conjoint causes. For an injury so caused, I think the defendants are liable. The rule already referred to is, that the master is not responsible to one servant for the ill consequences of the negligence of a fellow servant, in the course of the common employment. The reason for this rule is, that as the master cannot prevent carelessness in his servants, it is reasonable to presume each servant agrees to run the risk of that which he knows, in the nature of things, to be inevitable. But the servant does not agree to take the chance of any negligence on the part of his employer; and no case has gone so far as to hold that where such negligence contributes to the injury, the servant may not recover. It would be both unjust and impolitic to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the security of his servant. Contributory negligence, to defeat a right of action, must be that of the party injured.²

² Accord: *Grand Trunk R. R. v. Cummings*, 106 U. S. 700 (1882); *Hunn v. R. R.*, 78 Mich. 513 (1889); *Loveless v. Standard Oil Co.*, 116 Pa. 427 (1887); *re Petition Pacific, etc.*, S. S. Co., 130 Fed. 76 (C. C. A. 9th Circ., 1904); *Vaisbord v. Nashua Mfg. Co.*, 74 N. H. 470 (1908), and cases given in *Labatt on Master and Servant*, § 814, p. 814 and notes; and see *Washington, etc.*, R. R. v. *Hickey*, ante, p. 47 and notes thereto. So, probably, in Pennsylvania: *Wallace v. Henderson*, 211 Pa. 142 (1905), *semble*, p. 146; but see *Esher v. Southwark Mills Co.*, 221 Pa. 180 (1908), *contra* (*semble*).

While many cases exhibit a marked tendency to revert in this class of case to the doctrine of *Vicars v. Wilcocks*, ante, p. 107, and to hold that the negligent or consciously dangerous actions of the fellow servant are subsequent to the breach of the master's duty, especially where the delinquent servant knew of the conditions created thereby, is the sole legally responsible cause of the ensuing harm. *Phila. & Reading Iron Co. v. Davis*, 111 Pa. 597 (1886), fellow servant continuing to use appliance known by him to be defective; *Gila Valley R. R. v. Lyon*, 203 U. S. 465 (1906); and cases cited in note 6, §809, *Labatt on Master and Servant*; the master is usually liable though the injury is immediately caused by some subsequent negligent act (*Vaisbrod v. Co.*, supra) or omission on the part of a fellow servant (*Farrell v. Eastern Mfg. Co.*, 77 Conn. 484 [1905]; *Fitzgerald v. Ry. Co.*, 200 Mass. [1908] 105); and even where such fellow servant, fully conscious of the dangers created by the master's breach of duty, he acts in conscious disregard of his associates' safety (as in the principal case and *Noble v. Bessemer S. S. Co.*, 127 Mich. 103 [1901]). "The test to determine whether the defendant's negligence was the cause or the occasion of the plaintiff's injury is to inquire whether the negligence of the (fellow) "servant who wheeled the truck" (which striking a staging dislodged a plank from it which was not properly fastened, and which in its fall struck the plaintiff) would have produced the injury, even if they had used ordinary care to prevent it. If it would, then their negligence was the occasion merely; but if his negligence would not have caused the injury if the defendants had used ordinary care in its pre-

vention, then their negligence concurred with that of the (fellow) servant to produce the result of which the plaintiff complains. The servant who wheeled the truck testified that if he struck the horse (by which the staging was supported), the shock was so slight that he did not notice it. "It is obvious that it can be found from this testimony that the plank could not have fallen notwithstanding the truck struck the horse in passing, if the defendants had used ordinary care, either to fasten the plank to the horse, or the horse to the floor." Young, J., *Vaisbord v. Co.*, 74 N. H., p. 472.

SECTION 3.
Assumption of Risk

SKIPP v. EASTERN COUNTIES RAILWAY COMPANY.

Court of Exchequer, 1853, 9 Ex. 223.

At the trial, before Martin, B., at the London Sittings in the present term, it appeared that the action was brought by the plaintiff to recover compensation for an injury he had received whilst in the service of the company. The plaintiff had for many years acted as a guard, and had for three months prior to the accident been on duty at Lea Bridge station upon the line. It was his duty at that station to attach the trucks of the goods train which were to proceed to Norwich. The time allowed for the the duty was limited, as the next passenger train followed in about a quarter of an hour. In attaching the trucks the plaintiff was knocked down, and his arm was so severely injured that it became necessary to amputate it. Evidence was given to show that the work was too much for the number of servants employed by the company; but it did not appear that the plaintiff had ever made any complaint upon the subject to the company.

Upon this state of facts, the learned Judge was of opinion that the company was not liable. The plaintiff's counsel requested that the case might be submitted to the jury, but this his Lordship declined to do; and the plaintiff was nonsuited.

James now moved for a rule *nisi* for a new trial, on the ground of misdirection.—The plaintiff does not dispute the general principle which has been recognized and acted upon in the cases of *Hutchinson v. York, New Castle and Berwick Railway Company*, 5 Exch. 343, *Wigmore v. Jay*, *Id.* 354, and *Priestly v. Fowler*, 3 M. & W. 1, that a master is not in general liable to one servant for damage resulting from the negligence of another; but he rests his present cause of action upon a different ground. The plaintiff complains that the misfortune occurred by reason of the defendants' omission to provide a sufficient number of servants to perform the work in which he was engaged. The only plea being not guilty, the first question is, what are the allegations in the declaration which are admitted. The allegation of the duty which the defendants have imposed upon themselves, and upon which undertaking the plaintiff entered their service, is not traversed. [PARKE, B.—The defendants were bound to use all due and reasonable care only. Here the plaintiff was engaged in the same work for several months, and made no complaint whatever as to the inadequacy of the means employed. If he felt that he was in danger, by reason of the want of a sufficient number of fellow-servants, he should not have accepted the service.] The time allowed for the work, in the performance of which the accident occurred, was very limited. [PLATT, B.—The case falls within the maxim, *volenti non fit injuria*. MARTIN, B.—I acted upon that principle at the trial, being of opinion that the company was not liable,

as the plaintiff had done the same work for several months, without any intimation on his part that he was unable to carry it on; and I therefore considered him a voluntary agent.] It was a question for the jury, whether the company had in their employment a sufficient number of servants for the performance of this work. If they had not, they did not use due and reasonable care to prevent danger.

PARKE, B.—There ought to be no rule. This is an attempt to cast upon the jury the duty of fixing the number of servants which a railway company ought to have; but, in a case like the present, the company are themselves the proper judges of the number they require for carrying on the business of the line; and the question proposed was not a proper one for the jury.¹

ALDERSON, B.—As between the public and the company, the former may be the proper judges of the number of servants required; but that is not so as between the company and their own servants.

PLATT, B., concurred.

MARTIN, B.—I think that if the case had gone to the jury, they must have found a verdict for the defendants. But as I entertained a very strong opinion upon the matter, I thought it clearly to be my duty not to leave the case to them, upon the chance of their finding a verdict for the plaintiff from motives of commiseration. The plaintiff brought the accident upon himself, for, if he found that he could not do the work which was set him, he ought to have declined it in the first instance. He, however, carried it on for several months, and never made the least complaint upon the matter.

Bramwell, B., and Pollock, C. B., in *Dynen v. Leach*, 26 L. T. N. S., 221 (1857) p. 222.

BRAMWELL, B.—There is nothing legally wrongful in the use by an employer of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his works as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion when, as in this case, the workman has known all the facts and is as well acquainted as the master with the nature of the machinery and voluntarily uses it.

POLLOCK, C. B.—A servant cannot continue to use a machine he knows to be dangerous at the risk of his employer.¹

¹ See also Bradley, J., in *Tuttle v. R. R.*, 122 U. S. 189 (1886), p. 194; Danforth, J., in *Sweeney v. Berlin Envelope Co.*, 101 N. Y. 520 (1886).

² In England, at least before the decision of the House of Lords in *Smith v. Baker*, L. R. 16 App. Cases 325 (1891), the servant was required to allege and prove his ignorance of the unsafe state of the master's premises or appliances which occasioned his injury. *Accord: Peerless Stone Co. v. Wray*, 143 Ind. 574 (1896); *Mellott v. R. R.*, 121 Ky. 210 (1897); *Leasotte v. R. R.*, 70 N. H. 5 (1899); *Evans v. Co.*, 69 N. H. 664 (1899); but see *Quimby v. R. R.*, 69 N. H. 334 (1898), and *Hardy v. R. R.*, 68 N. H. 523 (1896); *Bethlehem Iron Works v. Weiss*, 100 Pa. 45 (C. C. A. 3rd Dist. 1900) *semble*, Gray, J., p. 52. Since *Smith v. Baker*, however, the burden seems to rest upon the defendant to prove that the plaintiff appreciated and

ELLSWORTH, J., in *Hayden v. Smithville Manuf'g. Co.*, 29 Connecticut 548, p. 558:

Every manufacturer has a right to choose the machinery to be used in his business and to conduct that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances, and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel, or occupy an old or new house, as he pleases. The employee having knowledge of the circumstances, and entering his service for the stipulated reward, can not complain of the peculiar taste and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service. This is just the distinction claimed by the defendants as the law of the case, but the court did not admit its correctness as the law of Connecticut, though conceding it to be the law of England.

Doubtless it is true that no man may, in conducting business, unnecessarily and wantonly disregard the rights of other people, whether employees or strangers; but such is not the case before the court. An employee having knowledge can not claim indemnity except under particular circumstances. He is not *secretly* or *involuntarily* exposed, and likewise is paid for the exact position and hazard he assumes; and so he may terminate his employment when, from unforeseen perils, he finds his reward inadequate or unsatisfactory.

THOMPSON v. HERMANN AND OTHERS.

Supreme Court of Wisconsin, 1879, 47 Wisconsin, 602.

The averments of the complaint, as amended, and thus stated by Mr. Justice Orton:

"The complaint charges, in effect, that the defendants are the owners, and one of them master, and the plaintiff, a seaman of the vessel 'Surprise,' sailing on Lake Erie, between the ports of Ashtabula and Erie; that while a heavy sea was running, and the vessel was pitching and rolling heavily, the jaw rope of the main gaff parted, and the gaff was unshipped, launched forward in front of the main mast, and swung over into the main rigging, and that the plaintiff, with other seamen, was ordered by the master to adjust the gaff, by standing upon the lower boom and pulling upon the bow-

voluntarily accepted the risks incidental to any dangerous conditions existing in the premises and appliances which are not necessary and inherent in the very nature of the business even though they existed at the time the employment began. *Williams v. Birmingham Co.*, L. R. 1899, 2 Q. B. 338. So in most American jurisdictions it is held that the burden rests upon the master to prove that the servant knew of any unnecessarily dangerous condition or that it was so obvious that he must have known of it had he used his senses. *Nadan v. White River Co.*, 73 Wis. 120 (1890), and cases cited *Labatt, Master and Servant*, §841, note 2. *Texas Pac. R. R. v. Archibald*, 170 U. S. 665, *semble*; *Grim v. Omaha Co.*, 114 N. W. (Neb. 1908) 769; *Dowd v. R. R.*, 170 N. Y. 459 (1902); *Jackson Lumber Co. v. Cunningham*, 141 Ala. 206 (1904); *Valjags v. Carnegie Steel Co.*, 226 Pa. 514 (1910), *semble*, p. 519.

line fastened to one of the horns of the jaw of the gaff, and was very likely and apt to slip from said horn, which was very smooth, worn and slippery, and cause plaintiff to fall from said boom to the deck below, and be thereby injured, all of which was well known to the master; that the plaintiff thinking it unsafe and dangerous to obey such order, objected and protested against the same, and informed the master, and insisted, that the main gaff could as well be adjusted by means of tackle then and there near at hand, and with safety to all concerned; but that the master refused to adopt such precautionary means, and imperatively ordered the work to be done in the dangerous way above stated; and that, in the careful discharge of his duty in obedience to such order, the plaintiff fell from said boom, and was injured, by reason of the slipping of the bow-line; and that the master was grossly negligent in not providing, adopting and using the safe and proper means and appliances for such work, and in ordering and directing it to be done in the dangerous manner above stated."

A demurrer to the complaint, as not stating a cause of action, was sustained; and plaintiff appealed from the order.

For the appellant, there was a brief by Markhams & Smith, and oral argument by E. P. Smith:

For the respondent, there was a brief by Ludwig & Somers, and oral argument by Mr. Somers:

A servant may decline any service in which he reasonably apprehends injury to himself (*Paterson v. Wallace*, 1 Macq., 748; *Buzzel v. Manuf'g Co.*, 48 Me., 113; 1 Add. on Torts, 488); and, being unfettered by any consideration but his own interests, if he incurs hazards which prove injurious, he cannot in law complain. *Moss v. Johnson*, 22 Ill., 633.

ORTON, J. We think the amended complaint in this action states a cause of action, and that the demurrer should have been overruled.

It is objected by the learned counsel of respondent, that the facts show that the service necessarily required by the employment was dangerous, and that the plaintiff, by entering upon it, took the risks and hazards upon himself, and that he was not bound to obey orders requiring such service, and might have declined the service, and abandoned the employment, and was negligent in not so doing.

We think that the peculiar character of the employment, and the relations existing between the master and the common seaman of a merchant vessel outside of port, remove this case from these objections and the authorities cited to sustain them; and that, although they might be correct legal propositions in respect to other kinds of employment, they have scarcely any application here.

If each seaman, when ordered to perform any work or duty in the management or repair of the vessel, were allowed by law to exercise his own free will, discretion and judgment in all cases of danger, and obey the master or refuse obedience at his pleasure, such a right would directly lead to general mutiny, and be fraught with great danger and peril, not only to the one so insubordinate, but to all on board, and to the ship and cargo as well. The language

of the books is, that "disobedience or misconduct of the sailor is of necessity punishable with great severity, because discipline must be preserved, and without it the ship would always be in great peril." 1 Parsons on Maritime Law, 463. "By the common law, the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters relating to the management of the ship and the preservation of good order, and such obedience they expressly promise to yield to him by the agreement usually made for their service. * * * Such an authority is absolutely necessary to the safety of the ship and of the lives of the persons on board." Abbott on Shipping, 177. "A deliberate refusal to do duty has always been considered as one of the highest offenses by the maritime law. The power to command must reside somewhere, and the law has placed it in the master. He may exercise it properly, or *harshly* and *unjustly*, and for this he is answerable when he returns to port." *The Palledo*, 3 Ware, 321.

"The master has an absolute authority on board his ship, and his orders, if not unlawful, are and must be imperative; submission is amongst the first duties of the seaman." *United States v. Smith & Coombs*, 3 Wash. C. C., 525.

The seaman on a voyage has no alternative but to obey or suffer punishment. He cannot dissent from or abandon the service on account of the dangers or unreasonableness of the particular service required, as he might do in port, but must obey at any risk or hazard to himself; and yet he voluntarily incurs no risk, but acts upon the risk and responsibility of those whose lawful authority demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own personal injury. The law which imposes upon the master this almost absolute authority, also imposes upon him the fullest responsibility for its careful, considerate and reasonable exercise in all emergencies, and in default of which it also imposes upon him a clear legal liability—or upon those he represents—for any personal damages occasioned by such default.

The plaintiff, by protesting against the dangerous and unreasonable manner of accomplishing the object proposed, and by which he was injured, and suggesting a safer and more reasonable way of accomplishing the same object, and then submitting to the order and authority of the master, and attempting to do the work required in a careful and prudent manner, did his whole duty, and thereby removed from himself all of the responsibility. The master, by declining and rejecting the safer and reasonable manner proposed by the plaintiff, and by gross carelessness imperatively commanding the plaintiff to perform the work in the more dangerous way, assumed all of the responsibility and risk for the defendants. The plaintiff entered upon this dangerous service under duress and submission to compulsion, without the liberty of choice or freedom of the will, and is therefore not responsible for his acts, without negligence. "Cases may and do arise when instant obedience to the orders of the mate is necessary; such as orders to

take in sail in a sudden squall, or to cut away the rigging or spars, or to go aloft on a sudden emergent duty, when the mate may instantly enforce obedience by the application of positive force, and indeed of all the force required to produce prompt obedience." *Flanders on Shipping*, § 73; *United States v. Hunt*, 2 Story C. C., 125; *United States v. Taylor*, 2 Sumner, 588.

The plaintiff avers that he used care, or was not in fault, in attempting with others to execute the orders of the master, and that he submitted to the judgment and authority of the master after protest, and this most clearly brings himself within the protection of these principles, and establishes his right of recovery. He could not have safely or lawfully done otherwise than submit under the circumstances; for his disobedience would have been revolt and mutiny, and he would have been liable to personal hazard and punishment; and to hold under such circumstances, that he cannot recover for his personal injuries, received without any fault of his own, and solely by the careless and unreasonable orders of his superior, would be outrageously unjust.

By THE COURT: The order of the county court sustaining the demurrer to the amended complaint is reversed, with costs, and the cause remanded for further proceedings according to law.¹

¹*Accord: Lafourche Packet Co. v. Henderson*, 94 Fed. 871 (C. C. A. 5th Cir. 1899); *The Frank & Willie*, 45 Fed. 494 (1891); *Keating v. Pacific Co.*, 21 Wash. 415 (1899); *Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187 (1892); Haight, J., dissenting on the ground, *inter alia*, that, the ship being in port, the plaintiff "could have left the vessel and sought the protection of his consul if the orders of his master were unlawful," see *Oregon Lumber Co. v. Portland S. S. Co.*, 162 Fed. 912 (1908), bargeman on barge coaling in harbor held to assume risk. This applies to all cases where the plaintiff being legally compelled to work for the defendant can not abandon the work when he discovers that it has become unduly hazardous, *Chattahoochee Bridge Co. v. Braswell*, 92 Ga. 631 (1893); *Dalheim v. Lenen*, 45 Fed. 225 (1891); convicts, whose services had been sold by the State to contractors (as to the effect of statutes, which deny, under penalties, the servant's right to leave his employment, see *Poirier v. Campbell*, 35 La. An. 699 [1883], and to cases where the master exercises an actual though illegal compulsion by violence of threats, *Wells and French Co. v. Gortorski*, 50 Ill. App. 445 (1893). So it is held that the plaintiff, when he is by law compelled to serve the defendant, does not assume the risk of injury of those working with him, *Boswelle v. Barnhart*, 96 Ga. 521 (1895), convict, injured by negligence of boss of "chain gang"; *Tozeland v. West Ham. Union*, L. R. 1906, 1 Q. B. 538, pauper required by the Poor Laws Acts to do such work as the labor master of the workhouse assigned to him; *Smith v. Steele*, L. R. 10, Q. B. 125 (1875), pilot, who was by law required to give his services to any vessel requiring them.

So, a servant, who while at work discovers that the appliances are defective, will not be taken to have assumed the risk thereof by continuing his service if by abandoning it he will imperil the lives of others or seriously derange the business of his master. *Irvine v. R. R.*, 89 Mich. 416 (1891), brakeman sent to set brakes to prevent collision discovers that they are dangerously unsafe. *Mason & O. R. R. v. Yockey*, 103 Fed. 265 (C. C. A. 6th Cir. 1900), engineer discovering defect in engine while on the road, see also *Brewer, J., in O'Rourke v. R. R.*, 22 Fed. 189 (1884), p. 191; *Fordyce v. Edward*, 60 Ark. 438 (1895), and see also *Kane v. R. R.* 128 U. S. 91 (1888), where, however, the conductor had promised the plaintiff, a brakeman, to remove the defective car at the next station. In such circumstances, the plaintiff is barred from recovery only if the risk of injury is so great and imminent as to make it imprudent for him to face it. See the above cases.

ST. LOUIS CORDAGE CO. v. MILLER.

Circuit Court of Appeals, Eighth Circuit, 1903, 126 Federal, 495.

SANBORN, J.—The defendant did not plead in this case that the plaintiff was guilty of contributory negligence. Its only defense was that the rapidly revolving cogs were seen and known by the plaintiff, that the danger from them was apparent, and that she assumed the risk of it. These are the questions, therefore, which the instruction to the jury presents: Are the risks from defective place of employment, appliances, and fellow servants which employes assume by entering and continuing in the service of a master with knowledge of the situation and its dangers and without complaint, limited to those risks the danger from which is so imminent that persons of ordinary prudence would not incur them? Or do the risks capable of assumption in this way include those less serious chances which servants of ordinary prudence would and do incur?

The charge of the court answered the first of these questions in the affirmative, and the second in the negative. It was, in effect, that the defense of assumption of risk and the defense of contributory negligence were identical in effect and coterminous in extent, that no servant in the exercise of due care can lawfully assume the risk of a defective place, defective machinery, or defective appliances, and that it is only where the danger from them is so grave that no prudent person would chance it that a servant can lawfully contract to take the chance of the injury which they may inflict upon him.¹

It is said that if, by entering or continuing in the service, an employé may assume the risk of a defect which arises from the violation of the duty of the master to exercise ordinary care to provide a reasonably safe place or reasonably safe appliances, the master may be in large part relieved from the discharge of this duty, and may be led to furnish more defective places and appliances than he otherwise would do, and that for this reason the doctrine of assumption of risk ought not to be permitted to apply in cases in which the danger is not so imminent that prudent persons would not incur it. The answer to this contention is: (1) That the servant is constantly at liberty to accept or reject the employment, and may do so at any time in case the wages do not in his opinion compensate him for the hazards as well as the work of his avocation; that he ought in the first instance to assume the known or obvious risks of the employment, because his constant use of the place and appliances necessarily makes him more familiar with

¹“This instruction,” he goes on to say, “was undoubtedly inspired by the opinion of the majority of this court in *Southern Pacific Co. v. Yeargin*, 109 Fed. 436, to which the writer never assented.” He then proceeds to examine the authorities cited in support of it; a number he dismisses as having been decided on the ground that the master had, upon complaint, made by the servant, promised to remedy the defect (see *Schlitz v. Pabst Co.*, *post*), and the others he finds to be cases in which the defense was contributory negligence and not assumption of risk or else cases when the two are said to be identical and interchangeable.

them than in the nature of things his master or inspector can ordinarily be; and (2) that by a simple complaint to his employer he may relieve himself from the assumption of the risk for a reasonable time to enable the master to remove the defect. But a discussion here of the question what the rule of law upon this subject ought to be will prove fruitless if that rule is already established by controlling authority, and the question whether or not it has become thus settled will, therefore, first be considered. Is it the law of assumption of risk declared or sustained by the decisions of the Supreme Court which are controlling here, that the risks which may be lawfully assumed are those only from which the danger is so imminent that no prudent person would incur it? Is it the law generally adopted by the federal courts, and usually applied by the courts of the states? If it is, many courts have misconceived this rule, and the books are full of long lines of erroneous decisions upon this subject.

The danger from unblocked frogs upon a railroad is not so imminent that employes of ordinary care and prudence would not and do not engage and continue to operate trains over them, and yet the Supreme Court and other courts hold that such servants assume the risk of the injuries which they may entail. *Southern Pac. Co. v. Seley*, 152 U. S. 145, 155.²

The danger of injury from low bridges on railroads is not so grave that servants of ordinary prudence and care would not and do not engage and continue to operate railroads through them, and yet they assume the risk of the injuries which result from these bridges. *Myers v. Chicago, St. P., M. & O. Ry. Co.*, 95 Fed. 406 407; *Brossman v. Railroad Co.*, 113 Pa. 490, 6 Atl. 226.³

The doctrine of assumption of risk is placed by the authorities and sustained upon two grounds. That doctrine is that, while it is the duty of the master to exercise ordinary care to provide a reasonably safe place for the servant to work and reasonably safe appliances for him to use, and while, unless he knows or by the exercise of reasonable care would have known that this duty has not been discharged by the master, he may assume that it has been, and may recover for any injury resulting from the failure to discharge it, yet he assumes all the ordinary risks and dangers incident to the employment upon which he enters and in which he continues, including those resulting from the negligence of his master which are known to him, or which would have been known to a person of ordinary prudence and care in his situation by the exer-

² Citing also *Appel v. R. R.*, 111 N. Y. 550; *Gillen v. R. R.*, 93 Me. 80; *Wood v. Locke*, 147 Mass. 604; *Mayes, Adm. v. R. R.*, 63 Iowa 563.

³ Citing also *Smith v. R. R.*, 42 Minn. 87; *Devitt v. R. R.*, 50 Mo. 302. He then gives instances of a number of other situations in which servants have been held to have assumed the risk of injury from conditions where the danger of injury was not so grave as to deter persons of prudence from working under them. *Cudahy Co. v. Marcan*, 106 Fed. 645; *Hoard v. Blackstone*, 177 Mass. 69; *Bohn Co. v. Erickson*, 55 Fed. 943; *Gowen v. Harley*, 56 Fed. 973; *Motey v. Pickle Marble Co.*, 74 Fed. 155; *King v. Morgan*, 109 Fed. 446.

cise of ordinary diligence. The first ground upon which this rule of law rests in the maxim, *volenti non fit injuria*. A servant is not compelled to begin or continue to work for his master. Ordinarily, he does not work for him under a contract for a stated time. He is at liberty to retire from his employment, and his master is free to discharge him, at any time. The latter constantly offers him day by day his wages, his place to work, and the appliances which he is to use. The former day by day voluntarily accepts them. By the continuing acceptance of the work and the wages he voluntarily accepts and assumes the risk of the defects and dangers which a person of ordinary prudence in his place would have known. No one can justly be held liable to another for an injury resulting from a risk which the latter knowingly and willingly consented to incur. *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 161; *Leary v. Boston & Albany Railroad*, 139 Mass. 580; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; *Mundle v. Mfg. Co.*, 86 Me. 400, 407.

The second ground upon which assumption of risk is based is that every servant who enters or continues in the employment of a master without complaint thereby either expressly or impliedly agrees with him to assume the risks and dangers incident to the employment which a person of ordinary prudence in his situation would have known by the exercise of ordinary diligence and care, and to hold his master free from liability therefor. Thus a master employs a servant to tear down or repair a building that is obviously in danger of falling upon the workman. The latter perceives the dangerous character of the place, and agrees upon the wages he will accept to perform it. The building falls upon, and injures him. He cannot recover of his employer, because he willingly assumed the risk. Another employs a servant to feed crude rubber between revolving rollers, and in pushing the material through the rollers his hand is caught and crushed. He cannot recover for his injury, because he voluntarily assumed the risk which the rollers and their use entailed. *Sullivan v. Simplex Electrical Co.*, 178 Mass. 35, 39, 59 N. E. 645. A third employs a servant to paint hatchets under a rack upon which they are placed to dry. During his employment this rack which safely held the hatchets is removed and a new one is substituted for it which is dangerous because the jar sometimes dislodges the hatchets and causes them to fall upon the workman below. Nevertheless the servant continues to paint beneath them. A hatchet falls upon and injures him. He cannot recover of his master for the injury, because he has voluntarily assumed the risk; and this is none the less true, says Mr. Justice Holmes, that fear of loss of his place induced him to stay. *Lamson v. American Axe & Tool Co.*, 177 Mass. 144, 145, 58 N. E. 585, 83 Am. St. Rep. 267. In the first case the danger may have been so imminent that a person of ordinary prudence would not have entered upon or continued in the employment. But in the two other cases it certainly was not of that character. The truth is that, while assumption of risk and contributory negligence both apply to prevent a recovery in cases in which

the servant has knowingly and willingly exposed himself to dangers too imminent for prudent persons to incur, they are neither identical in effect or coincident in extent, and the latter has no application and constitutes no defense in that great majority of cases in which assumption of risk is an impregnable bar to a recovery where prudent persons assume the obvious dangers of their employments which are neither imminent nor great. Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor. Contributory negligence is the causal action or omission of the servant without ordinary care of consequences. The one rests in contract, the other in tort. Contributory negligence is no element or attribute of assumption of risk. The latter does not prevail because the servant was or was not negligent in making his contract and in exposing himself to the defect and danger which injured him, but because he voluntarily agreed to take the risk of them. No right of action in his favor in such a case can arise against the master, because the latter violates no duty in failing to protect the servant against risks and dangers which the latter has voluntarily agreed to assume and to hold the former harmless from.

The clear distinction between assumption of risk and contributory negligence has been repeatedly announced and constantly maintained in the federal courts and in most of the courts of the States.⁴

In *Peirce v. Clavin*, 82 Fed. 550, 553, the Circuit Court of Appeals of the Seventh Circuit, in an opinion delivered by Judge Jenkins, said:

"The court below ignored wholly the doctrine of assumption of risk, and refused the instructions requested in that behalf, erroneously supposing that absolute knowledge of the defect which existed during the entire time of his service could not, under any circumstances, amount to an assumption of risk, but merely cast upon him greater care in the use, or in avoiding danger from the defective appliance. This is manifest error, for which we think the judgment must be reversed. The doctrine of assumption of risk is not to be confounded with the doctrine of contributory negligence; for, where the former doctrine is applicable, the servant may exercise the greatest care, and yet be precluded from recovery for an injury in the performance of his service, because the risk was assumed. *Miner v. Railroad Co.*, 153 Mass. 398, 26 N. E. 994."

To the same effect is the opinion of the Circuit Court of Ap-

⁴In addition to the quotations from *Peirce v. Clavin* and *Narramore v. Ry. Co.*, he also gives lengthy quotations, from *Washington R. R. v. McDade*, 135 U. S. 554; *Union Pac. R. R. v. O'Brien*, 161 U. S. 451; *Choctaw, Etc., R. R. v. McDade*, 191 U. S. 64; *Miner v. R. R.*, 153 Mass. 398, and *Hesse v. R. R.*, 58 Ohio St. 167, which are omitted, and see *Jaggard, J.*, in *Rase v. R. R.*, 107 Minn. 260 (1909); *Elkin, J.*, in *Bowen v. P. R. R.*, 219 Pa. 405 (1908), and 21 Har. L. R., pp. 245 to 251; but see *Brewer, J.*, 22 Fed. 189 (1884).

peals of the Sixth Circuit in *Narramore v. Cleveland, etc., Ry. Co.*, 96 Fed. 298, 301, 304, 305, where Judge Taft, delivering the opinion of that court, said:

"Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself, but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant." Pages 501, 502, 37 C. C. A., and page 301, 96 Fed.

After discussing various cases in which servants had entered or continued in the employment of their masters after discovering defects in machinery, he said:

"Assumption of risks is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or non-action in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences." Page 504, 37 C. C. A., and page 304, 96 Fed.

And again:

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it." Page 505, 37 C. C. A., and page 304, 96 Fed.

The unavoidable logical deduction from the principles and decisions to which we have adverted is that assumption of risk and contributory negligence are distinct and independent defenses, that the former rests in contract and upon the maxim, *volenti non fit injuria*, and is not conditioned or limited by the probability or improbability, the imminence or the remoteness, of the danger from the risk assumed, or by the existence or by the absence of contributory or other negligence on the part of the party who undertakes to assume the risk, while contributory negligence is founded

upon an absence of ordinary care which causes or contributes to the injury which is the basis of the suit.

Nor is the distinction between assumption of risk and contributory negligence less marked, nor is the former defense less applicable in cases of defects and dangers which arise during the continuance of the employment than in those involving defects which exist when the employé enters upon the service.⁵ The suggestion that in the former class of cases there is no consideration for the contract of assumption because the wages are not increased with the hazards is not persuasive. The answer to it is: (1) The doctrine of assumption of risk is founded on the maxim, *volenti non fit injuria*, as well as upon the express or implied contract arising from the employment, and continuance in the employment after new defects and dangers become obvious is conclusive evidence of a willing assumption of the risk which they entail; and (2) since, in ordinary employments, contracts for times certain do not exist, and either party is at liberty to terminate the service at any time, there is in fact a constantly recurring daily offer and daily acceptance of the risks of the known or obvious dangers and defects of the place and of the appliances, and of the wages tendered to induce an assumption of the work and the hazards. The reason which underlies the entire rule is that the servant who is constantly working in the place provided for him and daily using the tools and appliances furnished to him is more likely to know and to appreciate the dangers from defects in them than the master or his inspector, who, in the very nature of things, cannot see and know them so frequently and intimately as the employé who constantly uses them. This was the reason which induced the application of this rule to defects and dangers existing when servants enter upon their engagements, and when, in the nature of things, they are far less familiar with the defects and dangers incident to their avocations than they subsequently become after they have been long in the service. The reason of the rule applies with much greater force to dangers which arise and become known or are obvious to servants during their employment, because they have then become more familiar with their place and their appliances, and have earlier and better means of knowledge, and generally a better knowledge of changes in them, and of the effect and dangers of such changes,

⁵ See, however, *contra*, Cockburn, C. J., and Byles, J., in *Clark v. Holmes*, 7 H. & N. 937 (1862). The former says, p. 944, "through the negligence of the master in omitting to keep the machinery fenced, the servant has been exposed to dangers to which he ought not to have been subjected; and the injury having thus arisen, the defendant is justly and properly liable;" and the latter says, p. 949, "the original contract was to work with fenced machinery, and it was his master, and not he, has violated the condition, and by so doing exercised a species of compulsion over the servant." See also Lindley, L. J., in *Yarmouth v. France*, 19 Q. B. D. 647 (1887) p. 661—a case which is expressly stated to have been decided on this very ground by Lindley, L. J., and Coleridge, C. J., in their decision in the Court of Appeals in the case of *Smith v. Baker*, 5 Times L. R. 518 (1889); the former saying: "The plaintiff there was employed to drive a cart, and a vicious horse was put upon him, and he complained. He was not employed to break or drive

than they had of the dangers and defects incident to the original employment, and than their master or his inspectors can possibly obtain."

The authorities and opinions to which reference has now been made have forced our minds irresistibly to the conclusion that the following rules of law have become irrevocably settled by the great weight of authority in this country, and by the opinions of the Supreme Court, which, upon well-settled principles, must be permitted to control the opinion and action of this court:

A servant by entering or continuing in the employment of a master without complaint assumes the risks and dangers of the employment which he knows and appreciates, and also those which

vicious horses." The great weight of English authority is in accordance with the law as stated in the principal case. Before the Employers' Liability Act of 1880, the servant was required to allege and prove his ignorance of the defective condition which had caused his injury (*Griffith v. St. Katherine's Docks*, L. R. 13 Q. B. D. [259 (1884)]), whether it was one which existed when he was employed or whether it had arisen or come within his means of observation thereafter. *Priestley v. Fowler*, ante, p. 350; *Skipper v. Ry.*, ante, p. 449; and since the act it has been held in *Williams v. Birmingham Metal Co.*, L. R. 1899, 2 Q. B. 338, that it rests on the master to prove that the servant appreciated and voluntarily assumed the risk of a defect existing when he entered the master's service, a question which, save in very exceptional circumstances, must, under the English practice, be a question for the jury, *Dublin, etc., Ry. Co. v. Slattery*, L. R. 3 A. C. 1155 (1878).

At one time there appeared to be a distinct tendency in the Massachusetts and New York decisions to recognize a vital distinction between the servant's knowledge of dangers existing when he was employed and his knowledge of those arising thereafter, *Sweeny v. Envelope Co.*, 101 N. Y. 520 (1886); *O'Maley v. South Boston Gas Co.*, 158 Mass. 135 (1893), in which the Court, Knowlton, J., holds that a servant accepts the risks of dangers of risks existing when he enters the defendant's employment as fully under the Employers' Liability Act as at common law, but expressly states, p. 138, that it is manifest that the reasons which lead them to so decide can not apply to conditions which come into existence after the making of the contract; but see *Lamson v. Am. Ice Co.*, 177 Mass. 144 (1900), when a servant, suing under the act, was held to have assumed the risk of changed conditions by continuing to work after learning of the change.

In *Davis v. Forbes*, 171 Mass. 548 (1898), Knowlton, J., diss., p. 553, discusses this distinction at length—and holds that "the employer owes the employee no duty and can not be held guilty of negligence" in regard to defects openly existing in his plant when the contract of service is entered into, whether the servant actually knows of their existence or not; this he calls contractual assumption of risks—but as to defects arising subsequently, the master must show that the servant knew the condition and appreciated the risk, in his opinion generally a question of fact for the jury. Here his continuance in the employment after he appreciates the added hazard operates as a defense based on the maxim *volenti non fit injuria*. See, for a very similar view more elaborately set out, "*Smith v. Baker*," 8 L. Q. Rev. 202 *Esp.*, pp. 207 to 211, by Thomas Beven, Esq., and see also the same learned author's statement of the effect of this view upon the burden of proof. "Negligence in Law," 3rd Ed., p. 641.

* He then cites *Washington, etc., R. R. v. McDade*, 135 U. S. 554; *Steinhauser v. Spraul*, 127 Mo. 541; *Roberts v. Missouri, etc., Tel. Co.*, 166 Mo. 370; *Campbell v. Dearborn*, 175 Mass. 183; *Johnson v. Devoe Snuff Co.*, 62 N. J. L. 47; *Ford v. Mount Tom Co.*, 172 Mass. 544; *Brossman v. R. R.*, 113 Pa. 490.

an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation.

A servant who knows, or who by the exercise of reasonable prudence and care would have known, of the risks and dangers which arose during his service, but who continues in the employment without complaint, assumes those risks and dangers to the same extent that he undertakes to assume those existing when he enters upon the employment.

Among the risks and dangers thus assumed are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances and tools to use.

Assumption of risk and contributory negligence are separate and distinct defenses. The one is based on contract, the other on tort. The former is not conditioned or limited by the existence of the latter, and is alike available whether the risk assumed is great or small, and whether the danger from it is imminent and certain or remote and improbable.

The court below fell into an error when it instructed the jury that although the plaintiff continued in the employment of the defendant by the side of the visible unguarded gearing with full knowledge that the cogs which injured her were uncovered, still she could not be held to have assumed the risk of working by their side unless the danger from them was so imminent that persons of ordinary prudence would have declined to incur it under similar circumstances. *Choctaw, Oklahoma & Gulf R. R. v. McDade*, 191 U. S. 64 (1903).

There is another alleged error specified. A preliminary question for the judge always arises at the close of the evidence before a case can be submitted to the jury. That question is, not whether or not there is any evidence, but whether or not there is any substantial evidence upon which a jury can properly render a verdict in favor of the party who produces it.

The factory act of Missouri (2 Rev. St. 1899, § 6433) does not abolish the defense of assumption of risk in cases which fall under its provisions. In this respect it differs from the act of the Congress of the United States (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), which requires cars engaged in interstate commerce to be equipped with automatic couplers. Congress in that act expressly provided that in case the railroad companies failed to comply with its terms the employes should not be deemed to have assumed the risk thereby occasioned. Act March 2, 1893, c. 196, § 8, p. 532, 27 Stat. 352 [U. S. Comp. St. 1901, p. 3176]. The Legislature of Missouri had power to apply a similar provision to cases in which employers failed to keep their machinery safely and securely guarded, but they did not do so. The negligence of the master to safely and securely guard his machinery in accordance with the provisions of the law of Missouri is of the same nature as his negligence in providing a reasonably safe floor or axe or other tool or appliance, and there is no reason

why an action for a resulting injury should not be subject to the defense of assumption of risk in the one case to the same extent as in the other.

The question here, therefore, is: Was there any substantial evidence at the close of the trial below which would have warranted a finding and verdict by the jury that the plaintiff did not voluntarily assume the risk of the uncovered gearing? Of course, the question whether or not a servant has willingly assumed a risk of the service is, like all questions of fact, for the jury when the evidence is conflicting or when the deductions from it are doubtful, and, as this is usually the case in the trial of this issue, as in the trial of all other issues of fact, the general rule becomes that this question is ordinarily for the jury.

There are many cases in which the danger from the condition of the place or of the appliances is uncertain or recondite, as in *Ford v. Fitchburg R. Co.*, 110 Mass. 240-243, 261, where an explosion which could not have been reasonably anticipated resulted from a defect in a boiler which was known to the servant, and from such cases the rule arises that mere knowledge of the defect in the place or in the appliances does not necessarily establish the fact as a matter of law that the employé assumed the risk which the defect entailed.

There are other cases, like *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, in which a boy less than 14 years old and unacquainted with machinery was on the second day of his employment set to work in a noisy factory to break off ribbon, where he was required to draw his hands apart so that one of them would frequently come near an uncovered gearing, to which the rule applies that a servant does not assume the risk of a known defect unless he appreciates, or unless a person of his intelligence and capacity by the exercise of ordinary prudence would have appreciated, the danger arising from it.¹

Now, while it is true, as the decisions to which we have adverted declare, that mere knowledge of a defect by a servant who continues in the employment does not necessarily establish the fact as a matter of law that he has assumed the risk it entails, and while it is also true that he does not assume such a risk unless an ordinarily prudent person of his capacity in his situation would have appreciated the danger from it, it is equally true that a servant who enters or continues in the employment of his master in the presence of visible or obvious defects and plain or apparent dangers from them, which he knows or appreciates, or which an employé of his intelligence and capacity would by the exercise of ordinary care and prudence know and appreciate, assumes the risk of these dangers, and he cannot be heard to say that he did not appreciate them, and when the uncontradicted evidence establishes these facts no case arises in his favor, no question remains for the jury, and it is the duty

¹The extended discussion of a number of cases cited by the Appellee, of which the most important and interesting is *Kane v. R. R.*, 128 U. S. 91, is omitted.

of the court to peremptorily instruct them to return a verdict for the master.⁸

The record in the case at bar has been searched in vain for any fact or testimony adequate to withdraw it from the principles of law established by this strong current of decision, or to distinguish it from the cases which have been cited to illustrate the rule. This plaintiff was a young woman 20 years of age. The presumption is that she was possessed of ordinary intelligence and ability. She had been at work in factories for more than a year, and in the establishment of the defendant for more than six months. She knew that the gearing which injured her had been covered before Christmas, and that it was uncovered from that time until she was injured on February 13, 1902. She had worked at this machine by the side of the exposed mashing cogs from 10 to 15 minutes every day during the six weeks that they remained uncovered. She testified that she did not know that it was dangerous to run the gearing uncovered, but she knew the action of the lever, the greasy condition of its handle, its proximity to the mashing cogs, and she could no more have failed to know and to appreciate that the revolving cogs would crush her hand if she permitted it to slip between them than she could have failed to appreciate that boiling water would scald or fire would burn. One cannot be heard to say that he does not know or appreciate a danger whose knowledge and appreciation are so unavoidable to a person of ordinary intelligence and prudence in a like situation.⁹

The machinery, the cogs, the slippery lever, and their relation to each other, were open, visible, known. There was nothing recondite, imperceptible, uncertain, in the danger impending from them. It was plain and certain that if the employé permitted her hand to slip between the revolving cogs that hand would be injured. The defect of the unguarded gearing was obvious, the danger from it was apparent, and, without a disregard of the rules to which we have adverted and the decisions of the Supreme Court and of the other courts of the country to which reference has been made, there is no escape from the conclusion that the evidence in this case established without contradiction or dispute the facts that the plaintiff, by continuing in her employment without complaint, in the presence of an obvious and known defect and of a plain and apparent danger, assumed the risk of the injury which she sustained, so that she never had any cause of action against the defendant; and the court below should have so instructed the jury. The judgment below is accordingly reversed, and the case is remanded to the Circuit Court for a new trial.

THAYER, Circuit Judge (dissenting). I do not concur in the

⁸ The Court then cites in support of his position the following cases: *Higgins Carpet Co. v. O'Keefe*, 79 Fed. 900; *Buckley v. Mfg. Co.*, 113 N. Y. 540; *Engine Works v. Randall*, 100 Ind. 293; *Berger v. Ry. Co.*, 39 Minn. 78; *Kleinst v. Kunhardt*, 160 Mass. 230; *Tuttle v. R. R.*, 122 U. S. 189, and many others.

⁹ Citing *King v. Morgan*, 109, Fed. 446; *Moon Anchor Co. v. Hopkins*, 111 Fed. 298; *Buckley v. Co.*, 113 N. Y. 540.

foregoing opinion. The laws of Missouri (Rev. St. 1899, § 6433) required the defendant company to keep the gearing which occasioned the plaintiff's injury "safely and securely guarded when possible," for the protection of its employes. This statute was enacted in pursuance of a sound public policy; that is to say, to insure, as far as possible, the safety of the many thousand artisans and laborers who are daily employed in mills and factories throughout the State, and while so employed are exposed to unnecessary risks of getting hurt if belting, gearing, drums, etc., in the establishments where they work are left uncovered when so situated that they may be covered readily. The act was inspired by the same motives which induced the Congress of the United States (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) to require cars to be equipped with automatic coupling appliances when it was discovered that hundreds of brakemen were annually killed or made cripples for life by the use of the old-fashioned couplers that do not couple by impact. A wise public policy demands that as far as possible human life shall be preserved, and that there shall not be in any community a large class of persons who are unable to earn a livelihood because they have become maimed and crippled through exposure to unnecessary risks. The statute in question is not only a wise measure of legislation, but was prompted by a humane spirit. For these reasons it should not be so applied or construed by the courts as to defeat the objects which the Legislature had in view, nor in such a way as to render it less efficient than it was intended to be in the promotion of such objects.

It is conceded that the defendant company neglected to perform its statutory duty; it left the gearing, which inflicted the injury, uncovered for several weeks, although it could have been covered easily and was covered, when the plaintiff below entered its service; and as the result of such neglect the plaintiff below, a girl of 20, who had scarcely reached years of discretion, sustained a severe and painful injury. The majority of the judges of this court hold that she cannot recover because, by working at the machine for 10 or 15 minutes each day for about six weeks after the covering of the gearing had been removed, she consciously entered into a contract with the defendant company, although her wages were not increased, that she would assume the risk of getting hurt by the uncovered gearing, which she did not assume when she entered its service, and that she would absolve it from all liability. They hold, further, that although the plaintiff may not in fact have appreciated or foreseen the risk and danger which she incurred by working at the machine with the gearing uncovered, yet, because in their opinion a person of her age and intelligence ought to have appreciated it, they will infer that, with a full appreciation of the risk, she voluntarily entered into a contract with her master to assume it. By this ruling they impose on the servant the duty of being astute to ascertain risks and dangers incident to defects in tools and appliances which the master has provided, and in effect absolve the master in a great measure from his obligation, when providing tools and appli-

ances, to exercise care and foresight for the protection of his servants, this being a duty which from time immemorial the law has devolved on the master. *Texas & P. Ry. Co. v. Archibald*, 170 U. S. 665, 671, 672. Moreover, being of the opinion, apparently, that it would be quite unsafe to leave a jury of ordinary persons (who are familiar with the manner in which persons like the plaintiff, and in her situation, ordinarily think and act) to determine under the facts of this case whether the plaintiff did for a consideration voluntarily enter into the contract aforesaid, they declare that the jury had no right to decide that question, it being purely a question of law, with which the jury had no concern. And, lastly, they assert that when this plaintiff observed that the gearing in question was uncovered it was her duty to have thrown up her situation and quit the defendant's employment, or to have secured a promise from her employer to restore the covering within a short period, and that, inasmuch as she did not quit work or secure such promise, they, rather than a jury, will infer that she promised of her own free will to assume the risk. I do not concur in either of these propositions.

I do not regard the question whether "contributory negligence" and "assumption of risk," considered as defenses to an action for personal injuries, are identical or are different defenses as of much practical importance. That is rather a question for the schoolmen. It matters very little whether we say of a servant who has used a defective tool or appliance, which the master has supplied, with a full knowledge of the defect and a full appreciation of the danger incident to its use, that such a servant is as much at fault as the master and is guilty of contributory negligence, or whether we say that he has agreed to assume the risk and absolve the master from liability. The result, as respects the master's liability, is the same in whatever way we may choose to designate the defense.

The other questions, however, that are discussed in the opinion, and are decided in the manner above stated, are of great moment, affecting, as they do, the rights of thousands of people who are daily engaged in service and are liable to sustain injuries because reasonable precautions are not taken, by those who employ them, to prevent their being injured. In view of the motives which usually influence the conduct of men, I think it is certain that employers will be less careful in inspecting tools and machinery which they provide for their employés, less prompt in remedying defects therein when they are discovered, and less mindful of the discharge of the duties imposed on them by such a statute as the one involved in the case at bar, and other police regulations of that sort which may be made in the future, if the doctrine is established that by using an implement or machine having visible defects, although the risk of injury is not overshadowing and imminent, a servant thereby assumes the risk and agrees to hold the master blameless if he is hurt. The other doctrine, that the servant cannot rely upon the master to discharge the duty which the law imposes upon him to provide tools, appliances, and a place to work that is reasonably safe, but must be astute to discover defects therein and to appre-

ciate dangers incident thereto, and that he must either quit work or secure the master's promise to supply better tools and safer appliances, or else be denied compensation for any injury which he may sustain, is also a doctrine that is eminently well calculated to make employers less vigilant in the discharge of their duties to their employes, and less ready to obey the provisions of such laws as may be enacted to prevent the occurrence of distressing accidents. It is reasonably certain that employers will not be as willing and prompt to incur the expense of furnishing new and safer tools, and of providing additional safeguards against dangerous machinery, when they are advised that they can lay before their employes the alternative of throwing up their jobs or continuing to work with tools and machinery as they are, at their own risk, and can compel them to take their choice. In very many instances, no doubt, such expenditures as might be made and ought to be made to afford greater protection to persons engaged in service will be deferred to a more convenient season, and in the meantime injuries will be sustained that might have been avoided. When forced to the alternative of losing his situation or working with defective tools or in a situation that might be made safer, many an employé will choose the latter. Besides, many servants, especially those who are most worthy, will hesitate to make a demand for better and safer implements when they ought to be supplied, or to have the place where they work made safer, for fear of falling into disfavor with their employers and being classed as malcontents and grumblers. Another large class of persons who are young and venturesome, or by disposition and temperament are not prone to anticipate injuries or to appreciate dangers to which they are exposed, will continue to work with tools or appliances when they have become unsafe, utterly unconscious of the risks which they incur. Take the case at bar as an example. It is by no means improbable that the plaintiff, although she worked 10 or 15 minutes each day at the forming machine with the gearing uncovered, for several weeks before she was hurt, had never thought of such an accident as eventually befell her, and had never had a realizing sense or a conscious appreciation of the danger which my associates say, with so much confidence, she must have had, and accordingly decline to permit a jury to pass upon the question. And yet the Legislature foresaw that such an accident might happen, and for the protection of persons like the plaintiff enjoined upon the defendant company the duty of covering these gearings and keeping them covered so that such accidents might not happen. In other words, the Legislature made it the duty of the defendant company to protect the plaintiff from the risk to which they caused her to be exposed.

On grounds of public policy, therefore, and to insure the faithful discharge by employers of the duty which the law devolves on them and to prevent them from forcing their employes to assume risks which they of right ought to assume, the law ought to be as it was declared by the learned trial judge, that the plaintiff was not debarred from recovering compensation for the injuries which she sustained, merely by reason of the fact that she had worked at the

forming machine at intervals with the gearing uncovered, unless the jury believed that the risk of getting hurt was so grave and imminent that a person of ordinary prudence would not have incurred it. The principle so enunciated being just, both as it affects masters and servants, in that it places the responsibility for defective tools and appliances where it of right belongs, and the rule announced being easy of application and one that will tend to the protection of life and limb, there is, in my judgment, abundant authority to sustain it.¹⁰

I am also of opinion that even on the theory on which the majority decision proceeds, namely, that where by the negligence of the master his servant has been exposed to a risk of injury that was neither great nor imminent, he may, by continuing at work with knowledge of the danger, be held to have consented or agreed to assume it, the decision of my associates is erroneous in holding as a matter of law, on the facts and circumstances of the case, that the plaintiff did voluntarily agree to assume the risk to which she was exposed by the admitted fault of the master, and in withdrawing that issue from the jury. When the decision in *Thomas v. Quartermaine*, *supra*, was first announced, it was assumed by many that as the result of that decision, when an employer succeeded, in a personal injury case, in showing that his servant, before being hurt, had used the defective tool or appliance which occasioned the injury, with knowledge of the defect, or had shown that he had worked in an unsafe place with knowledge of its insecurity and had on that account sustained injury, he was immediately absolved from all liability for his neglect, and that the courts must perforce declare, as a matter of law, that the servant had agreed to assume the risk. It was very soon discovered, however, by the English judges, that this doctrine was exceedingly unjust to employes, and that it would enable employers to shift the responsibility for providing unsafe tools and appliances upon their servants.¹¹

The same view of the question under discussion has been taken in this country. For example, in *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537, it appeared that an employe in a mill, who had worked there for 13 years and was familiar with all of the surroundings, in attempting to go down some steps which were covered with ice, fell and was seriously injured. The ice upon the steps was caused by exhaust steam from an engine which was run by the defendant company, which fell upon the steps and froze, and the plaintiff knew the steps to be icy and more or less slippery in the winter season, and that at the time she was hurt she was going down the steps with a dinner pail in one hand and holding onto the railing with the other. It was

¹⁰ In support of his position he cites *N. Pac. R. R. v. Mares*, 123 U. S. 710; *Kane v. R. R.*, 128 U. S. 91; *So. Pac. R. R. v. Yeargin*, 109 Fed. 436; *Patterson v. R. R.*, 76 Pa. 389; *Ford v. Fitchburg*, 110 Mass. 240; *Lee v. Smart*, 45 Neb. 318; *Parker v. R. R.*, 48 S. Car. 364.

¹¹ An extended discussion of *Yarmouth v. France*, *Smith v. Baker*, is omitted.

held by the Supreme Judicial Court of Massachusetts, in an elaborate decision that the question whether the plaintiff had assumed the risk in question was a question of fact for the jury, and that it could not be said, as a matter of law, that she appreciated the risk and agreed to assume it. Also in the case of *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366, it appeared that the plaintiff, a servant girl, had fallen down a flight of steps in consequence of sleet and ice which had formed thereon because the defendant had suffered a skylight over the steps to become broken, thus permitting the sleet to form on the steps. It further appeared that the plaintiff had gone down the steps once before, that evening, and knew that they were slippery, and that when she fell she had hold of the railing and was trying to go down safely. The court held on this state of facts that the question whether the plaintiff had assumed the risk of injury by going down the steps, in their known icy condition, was properly submitted to the jury.¹²

I do not deny that there are cases where some courts have held that the risk encountered by a servant in using a defective implement or appliance was so obvious that he must have appreciated it fully, and for that reason have declared that he assumed it; but I maintain that in case of a clear omission of duty by an employer which has occasioned an injury, where an inference is to be drawn from facts and circumstances that a servant appreciated the risk incident thereto and voluntarily agreed to assume it, the inference is essentially one of fact and should be drawn by a jury, who are usually as well acquainted as judges with the motives which prompt human action, and who, in such cases as the one supposed, are quite as likely to form a correct conclusion. I have already remarked, and I repeat the thought, that it is not at all improbable that the plaintiff in this case had never considered the fact that her hand might slip between these uncovered cogs and be crushed. I have little doubt that a jury of reasonable men would have found without hesitation that she had never foreseen that such an accident might

¹² In both these cases the dangerous condition was temporary and constantly varying. It was due to the normal operation of natural forces prevalent in that climate during the winter months, and while not permanent was one which, in view of the exposed position of the stairway in *Fitzgerald's* case and of the bad repair of the covering of that in *Mahoney v. Dore*, was practically certain to constantly occur. In each case the court only considered the plaintiff's appreciation of the full extent of the risk at the particular time when the particular attempt to use the stairs was made which resulted in the injury. As to whether a servant by continuing to serve under conditions which to her knowledge have led to the creation of dangerous conditions during every storm assumes the risk of the certain recurrence thereof in future similar weather, see 20 Harv. L. R., 107, and *cf. Rase v. R. R.*, 107 Minn. 260. In the recent case of *Urquhart v. Smith and Anthony Co.*, 192 Mass. 257 (1906), where a servant was injured while trying to use an exposed boardwalk on his master's premises, upon which snow had been allowed to accumulate, these two cases, as well as the one in hand, were treated as identical in principle to those where a traveller is injured in an attempt to use a public way (see *Pomeroy v. Westfield*, ante p. 161) in which the defendant is liable unless the plaintiff is guilty of contributory negligence in making the attempt.

happen, and hence did not in fact appreciate the risk. She was comparatively young, and at an age when persons like her, in the course of their daily work, are not given to thoughts of lurking dangers. It is certain, I think, that she never thought of agreeing with her employer to assume the lurking danger to which she was in fact exposed, and to absolve her employer from all blame. The Legislature, however, appreciated the danger which she and thousands of others like her might unwittingly incur, and how they would naturally act—permitting their employers to make such provision for their safety as they saw fit, neither making any complaints on that account, nor quitting their employment. It accordingly said to employers, "You must cover machinery which may occasion injury when you can do so easily, and thus protect your servants from unnecessary risks." If such a duty can be evaded by voluntary agreements made by employers with their employes, and by implication only, then the existence of such agreements, when alleged, should be found by a jury. In no other way, in my judgment, will such statutes prove effective for the protection of human life.

This opinion has already been extended to unusual length. It is of greater length than a dissenting opinion in a personal injury case, or a majority opinion for that matter, ought to be. But the questions involved are important and will affect the rights of very many litigants, and on that account I desire to place on record a plain statement of the reasons why I dissent from doctrines which seem to me to have been formulated with an eye mainly to the protection of employers and with too little regard for the situation and rights of employes.

CHOCTAW, OKLAHOMA AND GULF R. R. CO. *v.* McDADDE.

Supreme Court of the United States, 1903, 191 U. S. 64.

The evidence tended to show that McDade, the plaintiff's decedent, while engaged upon the defendant's train as brakeman, was struck by a spout hung at an angle from a water tank, hurled from the car and killed.¹

DAY, J.:

The testimony makes it clear that in the proper construction of this appliance there is no necessity of bringing it so near to the car as to endanger brakemen working thereon. Whether hung at an angle or not, it can be so constructed as to leave such space between it and the top of the car as to make it entirely safe for brakemen in passing. The testimony makes it equally clear that when on the furniture car, McDade, sitting at his post, would be likely to be struck by the spout in passing. It is undoubtedly true that many duties required of employes in the transaction of business to be carried on by a railroad company are necessarily attended with danger, and can only be prosecuted by means which are hazardous and dangerous to those who see fit to enter into such employment.

¹The facts are greatly condensed from those given in the opinion.

Where no necessity exists, as in the present case, for the use of dangerous appliances, and where it is a matter requiring only due skill and care to make the appliances safe, there is no reason why an employé should be subjected to dangers wholly unnecessary to the proper operation of the business of the employer. *Kelleher, Admr., v. Milwaukee & Northern R. R. Co.*, 80 Wisconsin, 584; *Georgia & Pacific Railway Co. v. Davis*, 92 Alabama, 300.

The spout might readily have been so constructed and hung as to be safe. As it was maintained it was a constant menace to the lives and limbs of employés whose duties required them, by night and day, to pass the structure. It is a case where the dangerous structure is not justified by the necessity of the situation, and we agree with the judgments in the courts below that its maintenance under the circumstances was negligence upon the part of the railroad company. The court, having left to the jury to find the fact as to whether McDade was killed by the obstruction, did not err in giving instruction that the negligent manner in which the waterspout was maintained was, of itself, a conviction of negligence.

The court left to the jury the question of the assumption of risk upon the part of McDade with instructions which did not permit of recovery if he either knew of the danger of collision with the waterspout, or, by the observance of ordinary care upon his part, ought to have known of it. The servant assumes the risk of dangers incident to the business of the master, but not of the latter's negligence. *Hough v. Railway Co.*, 100 U. S. 213; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454; *N. P. R. R. Co. v. Herbert*, 116 U. S. 642; *N. P. R. R. Co. v. Babcock*, 154 U. S. 190. The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employé is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employé, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover. The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employé. *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665.

There was testimony tending to show that McDade had been over the part of the road where the Goodwin tank was situated only a few times, and that part of the trips were made in the night season. and also that the furniture cars were of unusual height as compared with those generally used in the transaction of the business of the company. Neither the assumption of risk nor the contributory negligence of the plaintiff below was so plainly evident as to require the jury to be instructed to find against the plaintiff, but, under the facts disclosed, these matters were properly left to the determination of the jury.²

BURNS v. DELAWARE & ATLANTIC TELEGRAPH CO.

Court of Errors and Appeals of New Jersey, 1904, 70 New Jersey Law 745.

The plaintiffs were laborers in the defendant's employment and were engaged in attending reels from which copper wire was being unwound while other employees were stringing them upon the defendant's poles.

While thus engaged he was injured by an electric shock received from the wire he was handling, and which resulted from the fact that the wire as it was reeled out had either broken or sagged and so come in contact with a live "trolley" wire.

² See *accord*: Jaggard, J., *Rase v. R. R.*, 107 Minn. 260 (1909), and cases cited therein, and see *Dettering v. Levy*, 114 Md. 273 (1911). In *Illinois Steel Co. v. Mann*, 100 Ill. App. 367 (1902), Waterman, J. says, p. 376: "A servant must take notice of * * * obvious danger, but he is not bound to look for (it); while the master must ascertain danger which can be found by the exercise of reasonable diligence. The master has a duty of inspection as well as observation, the obligation of a servant is that of observation alone," and Lippincott, J., says in *Dillenberger v. Weingartner*, 64 N. J. L. 292 (1899), p. 299, "the obvious risks * * * are the risks which are apparent in the exercise of ordinary observation and which are disclosed by the use of the eyes and other senses," and see *Comben v. Belleville Stone Co.*, 59 N. J. L. 226 (1896). A servant has no right to take a machine apart to ascertain whether a defect noticed therein is so serious as to render its use dangerous while the master is bound to do so. *Libby, McNeill, and Libby v. Cook*, 222 Ill. 206 (1906). In many cases it is, however, held that "a servant assumes the perils incident to his service of which he is informed or which ordinary care would disclose," *Allen v. R. R.* 69 N. H. 271 (1897), and Maine and Massachusetts cases there cited; and in *Rooney v. Sewall, etc., Co.*, 161 Mass. 153 (1894), it is held, *per* Knowlton, J., that it is not material whether a servant examines the machinery before he makes his contract or not, if he choose to waive examination, he takes the risk of all those open or obvious conditions which "could readily be ascertained by such examination and inquiry as one could be expected to make if he wished to know the nature and perils of the service in which he was about to engage."

See also *Boyd v. Harris*, 176 Pa. 484 (1896), where it is said that a servant assumes all such risks arising from his employment "as he knew or in the exercise of reasonable degree of prudence might have known" to be incident to his employment, and in which it was held that the plaintiff as a matter of law had assumed the risk of injuries received under circumstances very similar to those in the principal case; but see *Bannson v. Lutz*, 158 Pa. 166 (1893); and *Williams, J.*, in *Rummell v. Dilworth*, 131 Pa. 509 (1889), p. 519, where it is held that a servant is entitled to assume that the master has furnished reasonably safe appliances.

PITNEY, J. (After reciting the above facts and holding that there was sufficient evidence to justify the jury in finding that the defendants were guilty of negligence in failing to take precautions against such accidents by furnishing their workmen rubber gloves to wear and boards or platforms to stand upon): Moreover, the fact that the plaintiffs knew that no gloves, boards or platform had been furnished cannot be held to excuse the master from furnishing them if required in the exercise of reasonable care for the servant's safety. The jury might properly find from the evidence that the plaintiffs had no knowledge of the danger that necessitated the use of such precautions, and that the defendant, on the other hand, either had such knowledge or, if reasonably careful, would have possessed it. It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or, at least, to an ordinarily prudent servant, under the circumstances, that there is danger in such a situation. It is his voluntary acceptance of, or persistence in, an employment that involves personal hazard to him that debars his action; the theory of the law being that his wages have been fixed in view of the hazard. But where the danger is unknown to the servant, he cannot be held to have voluntarily assumed it, although the physical surroundings that create the danger are known to him. And so the known absence of safeguards or precautions cannot prevent a recovery where the danger that renders them necessary is unknown to the injured servant. 4 *Thomp. Negl.* (new ed.), §§ 4608, 4610, 4640. Thus in *Van Steenburgh v. Thornton*, 29 *Vroom*, 160, the negligence for which the master was held liable was the failure to brace the sides of a sewer trench in which the plaintiff was working. The plaintiff, of course, knew that the trench was not braced. But the defendant's representative knew, while the plaintiff did not, that there was danger of caving from the existence of a parallel trench that had been filled up. (See this case commented on in *Regan v. Palo*, 33 *Vroom*, 35, and *Curley v. Hoff*, 33 *Id.* 760.) So in *Smith v. Erie Railroad Co.*, 38 *Id.* 636, 644, it was insisted that since the plaintiff knew there was a defect in the railroad track he assumed the risk of a derailment caused by such defect. But this court said: "It was far from obvious to one traveling upon the train that the roughness of the track indicated a weakness sufficient to cause derailment. The trial judge therefore could not say, as a matter of law, that the plaintiff assumed the risk of the injury that he received, and so it was, at best, a question for the jury to determine whether the special danger was known to the plaintiff or was so obvious that he ought to have known of it." In a multitude of other cases in our courts the principle is impliedly recognized, if not distinctly declared, that it is the danger that must be known or obvious and not merely the physical situation in order to charge the injured servant with assumption of an obvious risk. The doctrine of "latent dangers" is largely grounded upon this distinction. *Paulmier v. Erie Railroad Co.*, 5 *Vroom*, 151; *Smith v. Irwin*, 22 *Id.* 507; *Foley v. Jersey City Electric Light Co.*, 25 *Id.* 411; *New York, Susquehanna and Western Railroad Co. v. Marion*, 28 *Id.* 94; *Electric*

Co. v. Kelly, Id. 100; *Western Union Telegraph Co. v. McMullen*, 29 *Id.* 155; *Chandler v. Coast Electric Railway Co.*, 32 *Id.* 380; *Johnson v. Devoe Snuff Co.*, 33 *Id.* 417; *Dillenger v. Weingartner*, 35 *Id.* 292; *Christenson v. Lambert*, 38 *Id.* 341.¹

DOUGHERTY, RESPONDENT, *v.* WEST SUPERIOR IRON AND
STEEL COMPANY, APPELLANT.

Supreme Court of Wisconsin, 1894. 88 Wis. 343.

The plaintiff was employed to make cores to be used in casting iron pipes—upon spindles run by hand power; but, after so serving for four or five months, was set to work upon spindles run by steam power. He objected to the work as being “too heavy” for him, but was told to “either go there or get out.” He obeyed and was soon after injured. Upon trial, the jury found a verdict for the plaintiff, from judgment upon which the defendant appealed.

PINNEY, J. We must hold, therefore, upon the facts of the case and the well-settled rule of law applicable to them, that the injury the plaintiff received was from one of the ordinary risks of the work he was engaged in, and that upon entering upon the work by direction of the foreman and under the circumstances stated, he assumed the risk, and is therefore not entitled, upon the facts shown, to recover in this action. The cases in this court are too numerous and too plain to justify further discussion.

The fact that Burns, the foreman, told the plaintiff, when he objected to working on the spindles driven by steam, “Either go there or get out,” does not obviate the objection to the plaintiff’s

¹See *Wagner v. Jayne Chemical Co.*, ante, p. 442, and *Schall v. Cole*, 107 Pa. 1 (1884). Where the question is as to whether the plaintiff assumes the risk of injury from a defective condition of a complicated machine—his knowledge or ignorance of the construction of the machine will determine whether the risk is obvious to him or not. *Heffernan v. Fall River Iron Co.*, 197 Mass. 28 (1907).

So it is held that a servant does not assume the risk of injury from conditions even if known to him if such conditions are only possibly dangerous. “Acquiescence ought to rest on positive knowledge, or reasonable means of positive knowledge, of the precise danger assumed; not on vague surmise of the possibility of danger.” Ryan, C. J., *Dorsey v. Phillips, etc., Co.*, 42 Wis. 483 (1877), p. 598; *Rase v. Ry. Co.*, 107 Minn. 260 (1909), a servant does not assume as matter of law the risk of injury from unguarded machinery with which he could only come into contact if something should happen to cause him to fall in that direction.

It is, however, not necessary that the servant should realize the extent or gravity of the injury threatened, *Feeley v. Pearson Cordage Co.*, 161 Mass. 426 (1891), where a workman was scalded by falling into an uncovered well; he knew of the well but did not know it contained boiling water. “It does not matter,” said Morton, J., “that he did not know of the precise extent or character of the injury he would sustain if he fell into the well. Such a test would introduce an impracticable element into the doctrine of assumption of the risk. It is enough that he knew that he might fall into the well and continued at his employment without objection. He must be held to have assumed the risk of whatever injury he might receive by falling into the well.”

right to recover. If an employee of full age and ordinary intelligence, upon being required by his employer to perform duties more dangerous or complicated than those embraced in his original hiring, undertakes the same, knowing their dangerous character, although unwillingly, from fear of losing his employment, and is injured by reason of his ignorance and inexperience, he cannot maintain an action therefor against his employer. *Leary v. B. & A. R. Co.*, 139 Mass. 580; *Bradshaw's Adm'r. v. L. & N. R. Co.* (Ky.), 21 S. W. Rep. 346; *Woodley v. Metropolitan R. Co.*, L. J. 46 Exch. Div. 521. Whatever danger or peril there was in the work he was ordered to do was, as already observed, plain and obvious. His objection to doing the work was not that it was dangerous, but that he did not understand it, and particularly that he was not strong enough to handle the cores. But, if he saw and understood that the work was of a dangerous character, it was his duty to decline the employment.

For these reasons it is plain that the recovery cannot be sustained.¹

¹ *Accord*: *Leary v. Boston & Albany R. R.*, 139 Mass. 580 (1885), in which Devens, J., says, p. 587, "Morally to coerce a servant to an employment, the risks of which he does not wish to encounter, by threatening to deprive him of an employment he can readily and safely perform, may sometimes be harsh; but when one has assumed an employment, if an additional and more dangerous duty is added to his original labor, he may accept or refuse it. If he has an executory contract for the original service, he may refuse the additional and more dangerous service; and, if for that reason he is discharged, he may avail himself of his remedy on his contract," see the similar view expressed by Lord Bramwell as to the rights of a workman, the dangers of whose employment are unduly increased after he enters into it, *Smith v. Baker*, L. R. 16 App. Cases, 325 (1891), p. 346.

Accord: also, *Sweeney v. Envelope Co.*, 101 N. Y. 520 (1885), where the servant was injured while performing the same services he had engaged to render, by a defect patent when he was engaged; *Lamson v. American Ax Co.*, 177 Mass. 144 (1900), and *Atchison, etc., R. R. v. Schroeder*, 47 Kans. 315 (1891), where the risks were unduly increased after the plaintiff had entered the defendant's service. It seems to be immaterial whether the servant encounters the risk while engaged in the ordinary routine labor of his employment, as in *Lamson v. Co.* and *Atchison R. R. v. Schroeder*, *supra*, or in obedience to a specific peremptory order, as in the principal case and *Worlds v. R. R.*, 99 Ga. 283 (1896), but see *contra*, *Wells & French Co. v. Krapaczynski* 218 Ill. 149 (1909), Scott, J., *diss.* and *Mason v. R. R.*, 111 N. C. 482 (1892). Nor is it material that the plaintiff's only alternative to facing the danger is the permanent loss of his employment or a mere temporary lay off. *Prentiss v. Kent Co.*, 63 Mich. 478 (1886), or that the threat of dismissal is express, as in *Sweeney v. Co.*, *Lamson v. Co.* and *Leary v. Co.*, *supra*, or tacit, as in *Atchison R. R. v. Schroeder* and *Worlds v. R. R.*, *supra*.

But a peremptory order, while not relieving the servant from the assumption of all the risk which the latter realizes that its obedience involves, is often an important factor in determining whether he actually appreciated a risk obvious to one not acting under the same pressure.

Such an order may well mislead the servant into a false sense of security and prevent his observing otherwise obvious defects, *Lee v. Woolsey*, 109 Pa. 127 (1885); *Haley v. Case*, 142 Mass. 316 (1886); nor is the servant bound to set up his own judgment against that of his employer or superior, *Wagner v. Jayne Chemical Co.*, *ante*, p. 442; *Indiana Car Co. v. Parker*, 100 Ind. 181 (1884); *Shortel v. St. Joseph*, 104 Mo. 114 (1891); *Hawley v.*

SMITH *v.* BAKER.*House of Lords, 1891. L. R. 16 Appeal Cases, 324.*

The plaintiff had been working for the defendants (who were railway contractors) for some months prior to the accident. The duties first assigned to him were to fill crates with stones; he was next engaged in slinging stones on to the crate and about two months before the accident he was set to work with two other workmen to drill holes in the rock, he working the drill while the others worked the hammers. On the day of the accident he was sent to drill a hole in the rock in a cutting near a crane worked by men in the defendants' employ.

The crane lifted stones and at times swung them over the plaintiff's head without warning. The plaintiff was fully aware of the danger to which he was exposed by thus working near the crane without any warning being given, and had been thus employed for months. A stone having fallen from the crane and injured the plaintiff, he sued his employers in the County Court under the Employers' Liability Act, 1880. The jury found (1) that the machinery for lifting the stone, taken as a whole, was not reasonably fit for the purpose for which it was applied; (2) that the omission to supply special means of warning was a defect in the ways, works, machinery and plant; (3) that the employers (or some person engaged by them to look after the condition of the works, &c.) were guilty of negligence in not remedying the defect; (4) that the plaintiff was not guilty of contributory negligence; (5) that he did not voluntarily undertake a risky employment with a knowledge of its risks; and returned a verdict for the plaintiff for damages.

Application was made on behalf of the defendants to have judgment entered for them, notwithstanding the findings of the jury, on the ground that the case ought not to have been allowed to go to them, the plaintiff having admitted that he knew of the risk and voluntarily incurred it. The learned judge directed judgment to be entered for the plaintiff for £100, the amount of damage assessed by the jury. Notice of a motion to set aside the judgment and to have judgment entered for the defendants was afterwards given in the Queen's Bench Division. The grounds stated in that notice, so far as are now material, were as follows:

R. R., 82 N. Y. 370 (1880); *Stapleton v. Traction Co.*, 5 Sup. Ct. (Pa.) 253 (1897), especially when the superior promises to see to the protection of the inferior while he is at work, *Reese v. Clark*, 198 Pa. 312 (1901), but a servant is not entitled to rely on even a positive assurance of safety given by the master, if the danger is so obvious that he must recognize that it is false, *Showalter v. Fairbanks*, 88 Wis. 380 (1894); *Toomey v. Eureka Co.*, 89 Mich. 249 (1891). In the earlier cases, in which assumption of risk is not distinguished from contributory negligence and the servant's knowledge of the defective conditions is treated merely as a factor in determining whether he has acted negligently in remaining in the defendant's service, the fact that the servant is peremptorily ordered to face a known peril is often regarded as an essential element for the jury's consideration upon this issue. See *East Tennessee R. R. v. Duffield*, 12 Lea (Tenn.) 63 (1883).

"That the case ought not to have been allowed by the judge to go to the jury, the plaintiff having admitted that he knew of the risk which caused his injury, and voluntarily incurred it.

"That on the plaintiff's own admissions, made on the trial of the action, a non-suit ought to have been entered by the judge.

"That the entry of the said judgment for the plaintiff was and is bad in law, and that the judge ought not to have entered judgment for the plaintiff."

The Divisional Court (Huddelston B. and Wills J.), before whom the appeal came, thinking that there was a conflict between the decisions of the Court of Appeal in the cases of *Yarmouth v. France* [19 Q. B. D. 647] and *Thomas v. Quartermaine* [18 Q. B. D. 685], which they were unable to reconcile, and which it was desirable that the Court of Appeal should explain, dismissed the appeal, at the same time granting leave to appeal.

The Court of Appeal (Lord Coleridge C. J., Lindley and Lopes L.JJ.) reversed the judgment of the court below and entered judgment for the defendants, mainly, or it may be said exclusively, on the ground that there was no evidence of negligence on the part of the defendants, although the Lord Chief Justice expressed an opinion that the judgment of the county court judge ought to be set aside on another ground also; namely, that the plaintiff had been engaged to perform a dangerous operation and took the risk of the operation he was so called upon to perform¹.

LORD HALSBURY L. C.: The objection raised, and the only objection raised, to the plaintiff's right to recover was that he had voluntarily undertaken the risk. That is the question, and the only question, which any of the courts, except the county court itself, had jurisdiction to deal with. Now, the facts upon which that question depends are given by the plaintiff himself in his evidence. Speaking of the operation of slinging the stones over the heads of the workmen, he said himself that it was not safe, and that whenever he had sufficient warning, or saw it, he got out of the way. The ganger told the workmen employed to get out of the way of the stones which were being slung. The plaintiff said he had been long enough at the work to know that it was dangerous, and another fellow-workman in his hearing complained that it was a dangerous practice.

My Lords, giving full effect to these admissions, upon which

¹"The Lord Chief Justice said that, in his opinion, the judgment must be reversed upon two grounds. The first ground was that the case was within the decisions in which it was held that a person engaged to perform dangerous work and taking the risk of the danger could not recover for an injury caused by such dangerous work. There never was a doubt of that doctrine before the Employers' Liability Act, nor had there been a doubt since. The supposed difficulties which arose from the decision of this Court in *Yarmouth v. France* and other cases, where the workman was not engaged to perform dangerous work, were not in question now." Lord Lindley concurring, said, *inter alia*: "The case of *Yarmouth v. France* was not like the present case. The plaintiff there was employed to drive a cart, a vicious horse was put upon him, and he complained. He was not employed to break or drive vicious horses." 5 Times L. R. 518 (1888).

the whole case for the defendants depends, it appears to me that the utmost that they prove is that in the course of the work it did occasionally happen that stones were slung in this fashion over workmen's heads, that the plaintiff knew this, and believed it to be dangerous, and whenever he could he got out of the way. The question of law that seems to be in debate is whether upon these facts, and on an occasion when the very form of his employment prevented him from looking out for himself, he consented to undergo this particular risk, and so disentitled himself to recover when a stone was negligently slung over his head or negligently permitted to fall on him and do him injury.

My Lords, I am of opinion that the application of the maxim *volenti non fit injuria* is not warranted by these facts. I do not think the plaintiff did consent at all. His attention was fixed upon a drill, and while, therefore, he was unable to take precautions himself, a stone was negligently slung over his head without due precautions against its being permitted to fall.

Now, I say that here evidence of negligence must by the form of procedure below be admitted to have been given, and the sole question to be dealt with is that with which I am now dealing. For my own part, I think that a person who relies on the maxim must show a consent to the particular thing done. Of course, I do not mean to deny that a consent to the particular thing may be inferred from the course of conduct, as well as proved by express consent; but if I were to apply my proposition to the particular facts of this case, I do not believe that the plaintiff ever did or would have consented to the particular act done under the particular circumstances. He would have said, "I cannot look out for myself at present. You are employing me in a form of employment in which I have not the ordinary means of looking out for myself; I must attend to my drill. If you will not give me warning when the stone is going to be slung, at all events let me look out for myself, and do not place me under a crane which is lifting heavy stones over my head when you keep my attention fixed upon an operation which prevents me looking out for myself."

It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim, *volenti non fit injuria*. I think they must go to the extent of saying that wherever a person knows there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. For this purpose, and in order to test this proposition, we have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited; but where it applies, it applies equally to a stranger as to anyone else; and if applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London streets; for no one (at all events some years ago, before the admirable police regulations of later years) could have crossed London streets without knowing that there was a risk of being run over.

It is, of course, impossible to maintain a proposition so wide

as is involved in the example I have just given; and in both *Thomas v. Quartermaine* [18 Q. B. D. 685] and in *Yarmouth v. France* [19 Q. B. D. 647], it has been taken for granted that mere knowledge of the risk does not necessarily involve consent to the risk. Bowen, L. J., carefully points out in the earlier case (*Thomas v. Quartermaine*) that the maxim is not *scienti non fit injuria*, but *volenti non fit injuria*. And Lindley, L. J., in quoting Bowen, L. J.'s distinction with approval, adds [19 Q. B. D. 660]: "The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff." And again, Lindley, L. J., says: "If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot in my opinion be held, as a matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it." Again, Lindley, L. J., says: "If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk and had not acted voluntarily in the sense of having taken the risk upon himself."

I am of opinion myself, that in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself.² It is manifest that if the proposition which I have just enunciated be applied to this case, the maxim could here have no application. So far from consenting, the plaintiff did not even know of the particular operation that was being performed over his head until the injury happened to him, and consent, therefore, was out of the question.

As I have intimated before, I do not deny that a particular consent may be inferred from a general course of conduct. Every sailor who mounts the rigging of a ship knows and appreciates the risk he is encountering. The act is his own, and he cannot be said not to consent to the thing which he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself, and where, therefore, the application of the maxim, *volenti non fit injuria*, is completely justified.

LORD BRAMWELL: The case is now before your Lordships, and there cannot be a doubt how it ought to be decided, unless, by some miscarriage of jury or judge or counsel, the defendants are to be made liable where they are absolutely free from legal blame.

² Compare *Fitzgerald v. Paper Co.*, 155 Mass. 155 (1891); *Mahoney v. Dore*, *ib.* 513; *Urquhart v. Smith & Anthony Co.*, 192 Mass. 257 (1906).

In the course of the argument I said that the maxim *volenti non fit injuria* did not apply to a case of negligence; that a person never was *volens* that he should be injured by negligence—at least, unless he specially agreed to it; I think so still. The maxim applies where, knowing the danger or risk, the man is *volens* to undertake the work. And I think the maxim does apply here; for the complaint in the statement of claim (the only thing proved) was, that there was no one to give notice when the stone was passing over where the plaintiff was at work. If this was wrong, the plaintiff knew of it and voluntarily undertook the risk. The case is different to a street accident, where a man is injured by the act of one between whom and him there is no relation. It is not dangerous apart from negligent driving. There is indeed a likeness. I admit that personal negligence in the master would make him liable; so also the use of dangerous plant not known to the servant.

If this is a maxim, is it any the worse? What are maxims but the expression of that which good sense has made a rule? It is a rule of good sense that if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation for which he did not stipulate. He can, if he chooses, say, "I will undertake the risk for so much, and if hurt, you must give me so much more, or an equivalent for the hurt." But drop the maxim. Treat it as a question of bargain. The plaintiff here thought the pay worth the risk, and did not bargain for a compensation if hurt; in effect, he undertook the work, with its risks, for his wages and no more. He says so. Suppose he had said, "If I am to run this risk, you must give me 6s. a day and not 5s.," and the master agreed, would he in reason have a claim if he got hurt? Clearly not. What difference is there if the master says, "No; I will only give the 5s.?" None. I am ashamed to argue it. I refer to the judgments of Bowen and Fry, L.JJ. in *Thomas v. Quartermaine*.

There is a confusion in the case. "*Volenti non fit injuria*," say the defendants. The plaintiff answers, "But you were negligent." The defendants reply, "No, we were not." The plaintiff rejoins, "You did not take that objection at the trial." I do not agree. But supposing it was so, what has that got to do with the question? The plaintiff advances this proposition, "You cannot rely on *volenti non fit injuria*, because that does not apply to a case of negligence. A man may be *volens* to encounter the natural dangers of a business, but not those superadded by negligence." I agree. But the plaintiff's proposition involves that he must make out negligence to take the case out of the rule. Assume that the defendants at the trial only took the objection *volenti non fit injuria*, that meant, "You were willing to run the ordinary risks; if you say there was anything extraordinary, show it." There certainly was none, for the reason I have given. Why are we to say that the danger was enhanced when there is positively no evidence of it? What was the danger the plaintiff was willing to run? This: having stones slung in a particular way jibbed over his head, with the risk of their falling from bad slinging or other cause, and nobody to warn

him when the jibbing caused the stone to come over him. How did the defendants enhance this? Did they cause the stone to be slung dangerously? As to no warning, the plaintiff knew he would have none. The plaintiff must have known that, if not inevitable or probable, the accident was possible. It is argued that there was a breach of duty in the defendants. What? What duty? Did the defendants ever undertake with the plaintiff that they would conduct their works otherwise than as they did that day? There is no such thing as abstract duty. Is there any evidence that the works were not being conducted as they were when the plaintiff entered the defendants' service? It is not necessary to consider whether this action would lie if the work was more dangerous after the employment had been entered into, and the workman knew it. It was indeed once held that if an obstruction was put before a cabman's stable he might run into it, and, if damaged, recover. I think the right course for the workman would be to say, "I entered your employment with a certain amount of risk, or with no risk, and you undertook to employ me. You have made it dangerous; that is a breach of your engagement, and I sue you." But it is immaterial in this case, for the work was unchanged in character, and was the same when he entered the service as when he was hurt. Besides, in these services every week there is a new engagement, and, therefore, his last week's work was under a contract made by the plaintiff, with full knowledge of the risk. If we suppose the contract was from week to week, till determined by notice, surely he is *volens* if he does not give the notice.

It is said that to hold the plaintiff is not to recover is to hold that a master may carry on his work in a dangerous way and damage his servant. I do so hold, if the servant is foolish enough to agree to it. This sounds very cruel. But do not people go to see dangerous sports? Acrobats daily incur fearful dangers, lion-tamers and the like. Let us hold to the law. If we want to be charitable, gratify ourselves out of our own pockets.

LORD WATSON: The maxim, *volenti non fit injuria*, originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome who, in concert with another, permitted himself to be sold as a slave, in order that he might share in the price, suffered a serious injury; but he was in the strictest sense of the term *volens*. The same can hardly be said of a slater who is injured by a fall from the roof of a house; although he too may be *volens* in the sense of English law. In its application to questions between the employer and the employed, the maxim as now used generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's. When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to

have undertaken it unless he knew of its existence, and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case.

LORD HERSCHELL:³ There may be cases in which a workman would be precluded from recovering even though the risk which led to the disaster resulted from the employer's negligence. If, for example, the inevitable consequence of the employed discharging his duty would obviously be to occasion him personal injury, it may be that, if with this knowledge he continued to perform his work and thus sustained the foreseen injury, he could not maintain an action to recover damages in respect of it. Suppose, to take an illustration, that owing to a defect in the machinery at which he was employed the workman could not perform the required operation without the certain loss of a limb. It may be that if he, notwithstanding this, performed the operation, he could not recover damages in respect of such a loss; but that is not the sort of case with which we have to deal here. It was a mere question of risk which might never eventuate in disaster.⁴ The plaintiff evidently did not contemplate injury as inevitable, not even, I should judge, as probable. Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim, *volenti non fit injuria*, applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong.

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever

³ The opinion of Lord Morris is omitted. He approves of the decision of the Court of Appeal in *Thomas v. Quartermaine*, L. R. 18 Q. B. D. 685 (1887), and of the principle stated by Bowen, L. J., in that case, viz.: "When the danger is visible and the risk appreciated, and when the injured party, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence." But he concurs with the majority because the jury had found that the machinery for "jibbing" the stones was, through the defendants' negligence, unfit, and while the plaintiff was "both *sciens* and *volens*" as to all the dangers of the system which he knew was practiced in the quarry, "how (could he) be held to have voluntarily incurred a danger from unfit machinery, the unfitness of which he was admittedly not aware of."

⁴ cf. *Rase v. R. R.*, 107 Minn. 260 (1909).

the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered. If, then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim, *volenti non fit injuria*, becomes applicable.

It was suggested in the course of the argument that the employed might, on account of special risk in his employment, receive higher wages, and that it would be unjust that in such a case he should seek to make the employer liable for the result of the accident. I think that this might be so. If the employed agreed, in consideration of special remuneration, or otherwise, to work under conditions in which the care which the employer ought to bestow by providing proper machinery or otherwise, to secure the safety of the employed, was wanting, and to take the risk of their absence, he would no doubt be held to his contract, and this whether such contract were made at the inception of the service or during its continuance. But no such case is in question here. There is no evidence that any such contract was entered into at the time when the plaintiff was first engaged, and the fact that he continued work notwithstanding the employer's breach of duty affords no evidence of such special contract as that suggested.

In *Yarmouth v. France*, the plaintiff was subjected to a risk owing to a defect in the condition of what was held to be plant within the meaning of sect. 1 of the Employers' Liability Act. He complained of this to the person who had the general management of the defendant's business, but was told nevertheless to go on with his work. He did so, and sustained the injury for which he brought his action. The county court judge gave judgment for the defendant on the ground that the plaintiff must be assumed to have assented to take upon himself the risk, on the authority of *Thomas v. Quartermaine*, to which case I will refer immediately. The Court of Appeal ordered a new trial. Lindley, L. J., said: "The Act cannot, I think, be properly construed in such a way as to protect a master who knowingly provides defective plant for his workmen, and who seeks to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations or submit to use what is known to be unfit for use." And further on he observes: "If nothing more is proved than that the workman saw danger, reported it, but on being told to go on went on as before to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of taking the risk upon himself."

I think that the judgment in *Yarmouth v. France* was perfectly right; but I should not lay the same stress as Lindley, L.J., did upon the fact that the workman had remonstrated against the

risk to which he was exposed, and on being told to continue his work did so to avoid dismissal. For the reasons which I have given, I think that where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine, *volenti non fit injuria*, which in my opinion has no application to such a case. It appears to me that sect. 2, sub-sect. 3, of the Employers' Liability Act, indicates that the Legislature regarded this as the law.⁶

SCHLITZ v. PABST BREWING CO.

Supreme Court of Minnesota, 1894, 57 Minn. 303.

GILFILLAN, C. J. Plaintiff, a driver of defendants employed to drive a delivery wagon, was, while so employed, injured, as he claims, through a dangerous defect in the wagon he was using. The evidence was such as to justify a finding that the wagon was defective to such a degree as to be dangerous to the driver, and that the injury to plaintiff was in consequence of its dangerous condition.

. Both parties, employer and employé, knew equally well the dangerous condition of the wagon, so that, under ordinary circumstances it would be a case of the assumption of risk by the employé continuing to use it.

⁶The same rule applies where the defect existed when the plaintiff entered the defendant's employment, *Williams v. Birmingham Metal Co.*, L. R. 1899, 2 Q. B. 338: "If the defence of '*Volenti non fit injuria*' was to be insisted upon, they (the defendants) must have obtained a finding of the jury in their favor." A. L. Smith, L. J., p. 344. So Romer, L. J., says p. 345: "In order to escape liability the employer" (who by a failure to use all reasonable precaution to protect his servant, has been *prima facie* liable for the latter's injuries) "must establish that servant has taken upon himself the risk. (This) is a question of fact to be decided upon the circumstances of each case. In considering such question the circumstance that he has entered upon, or continued in his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him."

In America this case has been followed only in North Carolina. *Lloyd v. Hanes*, 126 N. C. 359 (1900), where, at p. 363, it is said "the doctrine of assumption of risk extends no further than that if a machine (is) dangerous, and the employee, seeing the danger, does not report its condition, but goes on with his work in disregard of it, he assumes the risk"; *Pressly v. Yarn Mills*, 138 N. C. 410 (1905).

In *Mobile, etc., R. R. v. Holborn*, 84 Ala. 133 (1887), it was held that under §2590 of the Code of 1886 (one of the sections in which a practical counterpart of the English Employers' Liability Act was embodied), a company which actually knew that its plant was defective could not set up as a defense against the servant injured thereby, that the latter knew of the defect and had, without complaining or giving notice thereof, continued his employment, but this case was overruled in *Railroad v. Allen*, 99 Ala. 374 (1892), decided upon the authority of *Thomas v. Quartermaine*, *Smith v. Baker*, decided the year before, appearing not to have been brought to the attention of the Court.

But it is a well-settled rule that, where the servant, though he knows the dangerous condition of the instrumentality furnished him, is induced to continue its use by the request of the master, and his promise to remedy the defect after complaint made to him by the servant, he may continue such use for a reasonable time for the defect to be remedied without assuming the risk incident to its dangerous condition, unless it be so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it. *Greene v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 248 (17 N. W. 378).

The most logical reason for the rule is that, under such circumstances, it must be taken as understood between them that the continued use in the then condition of the instrumentality, being for the convenience and purposes of the master, is to be at his risk, and not at the risk of the servant.¹

The cases in which the rule has been applied have been cases where there was a promise on the part of the master to remedy the defect. But we can see no difference in principle between such cases and those where, upon the servant's objecting to continue the use, the master for his own convenience and purposes, induces the servant to continue it for a short time, upon the promise that the use shall be discontinued at the end of such time. What, for instance, could be the difference on the matter of assuming the risk between a promise to remedy the defects of this particular wagon and a promise to furnish another without such defects? We can see none.²

Of course, though in such a case the risk incident to the dangerous condition of the instrumentality is on the master, if the servant, by his own negligence in the manner of using it, bring injury on himself the master will not be liable.³

¹In *Dempsey v. Sawyer*, 95 Maine 295 (1901), the theory that the servant's assumption of risk is based upon an actual, though implied, agreement, is carried to its logical limit. By complaint the servant shows his unwillingness to continue to bear the risk, by the promise to repair the risk is transferred to the master; whether the servant, by continuing to work, in the expectation that the promise will be performed, shows a willingness to again take on himself the risk is a question for the jury.

In *Morden Frog Works v. Fries*, 228 Ill. 246 (1907), it is said, p. 251, that "by the promise a new relation is created, whereby the master impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable time following the promise."

²If the premises and appliances are in good order and up to the standard customary in similar establishments, the servant obtains no right of action because the master promises to supply some additional protection. *Higgins v. Fanning*, 195 Pa. 590 (1900); *Leonard v. Hermann*, *Ibid.*, 222; *Nealand v. R. R.*, 173 Mass. 42 (1899); *Branstrator v. R. R.*, 108 Iowa 377 (1899). Nor can a promise to protect a servant from a particular danger, e.g., falling timber, relieve the servant from his assumption of the risk of injury from the negligence of his fellow servants. *Vogt v. Hornstain*, 81 Minn. 174 (1900).

³*Texas, etc., R. R. v. Bingle*, 9 Tex. Civil App. 322 (1895); *Bolton v. Georgia, etc., R. R.*, 83 Ga. 659; *Jones v. New American File Co.*, 21 R. I. 125 (1898).

Whether that was this case, and whether the wagon was so imminently and immediately dangerous that an ordinary prudent man would refuse to use it longer, was for the jury.

Judgment affirmed.⁴

⁴*Clarke v. Holmes*, 7 H. & N. 937 (1862); *Hough v. Railway Co.*, 100 U. S. 213 (1879); *District of Columbia v. McElligott*, 117 U. S. 621 (1886); *Patterson v. R. R.*, 76 Pa. 389 (1874); *Webster v. Coal Co.*, 201 Pa. 278 (1902); *Counsell v. Hall*, 154 Mass. 468 (1888); *Rice v. Eureka Co.*, 174 N. Y. 385 (1903); *Dowd v. Erie R. R.*, 70 N. J. L. 451 (1904). *Contra*: *Crichton v. Kerr*, 1 Sc. Sess. Cases, 4th Series, 407 (1863). Mere complaint alone is not sufficient, there must be a promise to repair the defect, *Shackleton v. R. R.*, 107 Mich. 16 (1895); mere expressions of regret for the existence of the defect are not enough. *Russ v. Rafsnyder*, 178 Pa. 397 (1896). It is however said in *Rush v. R. R.*, 36 Kans. 129 (1887), p. 137, that a servant may expect that the master will upon notice remedy minor defects arising from mere wear and tear and requiring only ordinary and usual repairs. The promise must be given by the master or by some subordinate who has the power to make repairs and authority to promise them. *Bowen v. P. R. R.*, 219 Pa. 405 (1908); *Jones v. New American File Co.*, 21 R. I. 125 (1898); *Purkey v. Southern Coal Co.*, 57 W. Va. 595 (1905); *Ehmcke v. Porter*, 45 Minn. 338 (1891); *Wilson v. Winona R. R.*, 37 Minn. 326 (1887); but see *Dells Lumber Co. v. Erickson*, 80 Fed. 257 (1897), where it is held that it is enough that the servant had reason to believe that the person making the promise had authority to make it.

The servant must complain of the defect because of the danger to himself, *Morden Frog Co. v. Fries*, 228 Ill. 246 (1907). Not because it may injure some one else, either a fellow servant, visitor or patron of his master, *Lewis v. R. R. Co.*, 153 Mass. 73 (1891); nor because it makes the work more difficult. *Gowen v. Hailey*, 56 Fed. 973 (1893); nor because it may affect the quality of the work done. *Tesmer v. Boehm*, 58 Ill. App. 609 (1895). Not only must he complain on his own account, but the promise to repair must induce him to remain in the defendant's employment. *Lewis v. R. R.*, *supra*; *Bodwell v. Nashua Mfg. Co.*, 70 N. H. 390 (1900); *Showalter v. Fairbanks Co.*, 88 Wis. 376 (1894). He must establish that he intended to leave if the repairs were not made, *Hayball v. R. R.*, 114 Mich. 135 (1897), and that his master or his representative understood this to be his intention, *Morden Co. v. Fries*, *supra*, though this intention need not be expressly stated to the master, but may appear from the nature of the complaint and the circumstances under which it is made, *Ibid.* p. 251; *Rothenberger v. N. W. Mills Co.*, 57 Minn. 461 (1894).

The servant is entitled to believe that the master has performed his promise and to expect to find the appliance put in good order and does not assume the risk of injury because he uses it without subjecting it to an examination to see if it has been repaired. *Northern Pac. R. R. v. Babcock*, 154 U. S. 190 (1893).

Various tests have been laid down as to what is a "reasonable time" within which the servant may continue to work under conditions, known by him to be defective, in the expectation that they will be remedied. It is said to be such time as is reasonably sufficient to enable the master to remedy the defect, *Ill. Steel Co. v. Mann*, 170 Ill. 200 (1897); to be the time during which the servant may reasonably expect the master to fulfil his promise, *Counsell v. Hall*, *supra*; *Mann v. R. R.*, 124 Mich. 641 (1900); to last until it is "made manifest" that the promise will not be kept, *M. K. & T. R. R. v. Baker*, 35 Tex. Civ. App. 542 (1904); to last "until such time has elapsed as would preclude all reasonable expectation that the defect would be remedied," *Taylor v. Coal Co.*, 110 Iowa. 40 (1899). The question is one for the jury under all the circumstances unless it be clear that the time has been unreasonable. In *Meyer v. Gunlach-Nelson Co.*, 67 Mo. App. 389 (1896), and *Weber Co. v. Kehl*, 40 Ill. App. 585 (1891), two weeks; in *Rotherberger v. N. W. Co.*, 57 Minn. 461 (1894), ten days; in *Harrison v. Collins*, 25 R. I. 489 (1903), seven days, and in *Belair v. R. R.*, 43 Iowa 662 (1876), three months, were held

BRAMWELL, B., in *Britton v. The Great Western Cotton Company, Ltd.*, Court of Exchequer, 1872, 27 L. T. N. S. 125,¹ at p. 129:

I am of opinion that there was a clear breach by the defendants of their statutory duty. And now comes the question, and one which raises the chief difficulty in the case. Can the plaintiff maintain the present action? It must be assumed that the deceased died from injuries received from the fly wheel, and not that he had a fit and died, and was caught by the wheel after death. The maxim, *volenti non fit injuria*, is well known. Does it apply here? I think not. The man, it is true, was a volunteer in one sense. He was, that is, *volens*, in the sense that he voluntarily entered on the employment. He need not have gone there. But in order to make the maxim applicable, he must not only have been a volunteer, but he must have entered on the service with a knowledge of the danger and of the nature and extent of the risk which he was about to run. Now was that the case here? It has been suggested that the man must have known it; at any rate, as well as his employers did. But I do not think that that is at all necessarily so, for it must be remembered that the deceased was not what is called a "skilled workman," he was only a coal trimmer; nor can I really see that the employment was very dangerous, or the place of necessity so. At all events, it was not so obviously dangerous that the deceased must be taken to have *knowingly* encountered the danger, and run the risk. The accident most likely happened from some misfortune, such as

not to be, as matter of law, unreasonable. See for other cases *Labatt, Master and Servant*, §430, note 3. When the complaints and promises are renewed the servant may not unreasonably continue in his employment for a much longer time than if only one promise was made. *Maines v. Harbison Walker Co.*, 213 Pa. 145 (1906), six weeks; *Clarke v. Holmes*, *supra*, one year.

Where the repairs are promised to be made by a definite time, expressly or by implication (as when there was a promise to repair a defective locomotive before a particular trip, *Albrecht v. R. R.*, 108 Wis. [1901], 530), the servant who continues to work thereafter, knowing that the conditions remain unchanged, reassumes the risk. *Andreiczik v. N. J. Tube Co.*, 73 N. J. L. 644 (1906); *Eureka Co. v. Bass*, 81 Ala. 200 (1886); *Trotter v. Chattanooga Co.*, 101 Tenn. 257 (1898).

A servant does not assume the risk of injury while continuing for a reasonable time at work under the defective conditions in the expectation that the promised repairs will be made, even though the time at which they are to be done is indefinite, *Sapp v. Christie Bros.*, 79 Neb. 701 (1908); master promised to repair when "he caught up to his orders." *Contra: Standard Oil Co. v. Helmick*, 148 Ind. 457 (1897), *aliter*, where a definite time is set, *McFarland v. Potter*, 153 Ind. 107 (1899). In some jurisdictions a distinction is made between a promise to repair a simple tool or appliance, which does not relieve the servant continuing his work in consequence thereof from the assumption of the risk, *Marsh v. Chickering*, 101 N. Y. 396 (1886); *Baumwald v. Trenkman*, 88 N. Y. S. 182 (1904); *Webster Mfg. Co. v. Nesbitt*, 205 Ill. 273 (1903); *Gowen v. Harley*, *supra*; *Meador v. R. R.*, 138 Ind. 290 (1894); and a promise to repair a complicated machine, *Laning v. R. R.*, 49 N. Y. 521 (1872); *Sweeney v. Envelope Co.*, 101 N. Y. 520 (1886); *Morden Co. v. Fries*, *supra*, but see *Spenser v. Worthington*, 44 N. Y. App. Div. 496 (1899).

¹ This case is also reported in L. R. 7 Ex. 130; 20 W. R. 525; 41 L. J. Exch. 99, in each of which a somewhat different version of this opinion is given.

might have happened anywhere, as for instance a fall, or a sudden fit of giddiness, or some misadventure of that sort, and not solely and simply from the dangerous nature of the place. There is not in the present case the dilemma which often arises in an action for a breach of a common law duty, namely, either the danger was obvious or it was not; if it was obvious, the servant must have known it as well as the master, and if it was not obvious, there was no negligence on the master's part. The plaintiff in this case is not in that dilemma, because the duty, the breach of which is here charged in the second count, is a statutory one.²

NARRAMORE *v.* CLEVELAND C. C. & ST. L. RY. CO.

Circuit Court of Appeals, Sixth Circuit, 1899. 96 Fed. 298; 37 C. C. A. 499.

In error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

The plaintiff, a yard switchman, was injured while coupling cars, by reason of his foot becoming caught in an unblocked guard rail. By a statute of Ohio (85 Ohio Laws, p. 105), it was enacted that every railroad corporation should block the guard rails upon its tracks, "so as to prevent the feet of its employees being caught therein," and that a failure to comply with the provisions of this Act should be punishable by a fine of not less than one hundred dollars, nor more than one thousand dollars.

At the close of the evidence the trial court directed the jury to return a verdict for the defendant, on the ground that the defendant's failure to block its rails and switches was obvious, and the plaintiff must be held, notwithstanding the statute, to have assumed the risk of injury therefrom, and upon such verdict entered judgment for the defendant.

Before Taft and Lurton, Circuit Judges, and Thompson, District Judge.

Taft, Circuit Judge (after stating the above facts): The sole question in the case is whether the statute requiring defendant railway, on penalty of a fine, to block its guard rails and frogs, changes the rule of liability of the defendant, and relieves the plaintiff from the effect of the assumption of risk which would otherwise be implied against him. We have already had occasion to consider in a more or less direct way the effect of the statute. *Railway Co. v. Van Horne*, 16 C. C. A. 182, 69 Fed. 139; *Railway Co. v. Craig*, 19 C. C. A. 631, 73 Fed. 642. In these cases we held that the failure on the part of a railway company to comply with the statute was negligence *per se*. A further consideration of the statute confirms our view. The intention of the legislature of Ohio was

² See the dissenting opinion of Lord Esher, M. R., in *Thomas v. Quartermaine*, L. R. 18 Q. B. D. 685 (1887), p. 687, and his opinion in *Yarmouth v. France*, 19 Q. B. D. 647 (1887), p. 649, in which he appears to regard the Employers' Liability Act of 1880 as imposing new statutory duties upon the master for the servant's protection; and see, also, 20 Harv., pp. 99 and 100.

to protect the employ  s of railways from injury from a very frequent source of danger by compelling the railway companies to adopt a well-known safety device. It was passed in pursuance of the police power of the state, and it expressly provided, as one mode of enforcing it, for a criminal prosecution of the delinquent companies. The expression of one mode of enforcing it did not exclude the operation of another, and in many respects more efficacious, means of compelling compliance with its terms, to wit, the right of civil action against a delinquent railway company by one of the class sought to be protected by the statute for injury caused by a failure to comply with its requirements.¹

In this case there can be no doubt that the act was passed to secure protection and a newly-defined right to the employ  . To confine the remedy to a criminal proceeding in which the fine to be imposed on conviction was not even payable to the injured employ   or to one complaining, would make the law not much more than a dead letter.

Do a knowledge on the part of the employ   that the company is violating the statute, and his continuance in the service thereafter without complaint, constitute such an assumption of the risk as to prevent recovery? The answer to this question is to be found in a consideration of the principles upon which the doctrine of the assumption of risk rests. If one employs his servant to mend and strengthen a defective staircase in a church steeple, and in the course of the employment part of the staircase gives way, and the servant is injured or killed, it would hardly be claimed that the master was wanting in care towards the servant in not having the staircase which fell in a safe condition. Why not? Because, even if no express communication is had upon the subject, the servant must know, and the master must intend, that the dangers necessarily incident to the employment are to be at the risk of the servant, who may be presumed to receive greater compensation for the work on account of the risk. The foregoing is an extreme case, perhaps, but it fairly illustrates the principle of assumption of risk in the relation of master and servant. Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk, and is

¹ See accord: *Stehle v. Jaeger Co.*, 220 Pa. 617 (1907), with which compare *Mack v. Wright*, ante, p. 186.

well supported by the judgments of Lord Justices Bowen and Fry in the case of *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 695. See, also, language of Lord Watson in *Smith v. Baker* (1891) App. Cas. 325, and *O'Malley v. Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119. It makes logical that most frequent exception to the application of doctrine by which the employé who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it.

From the notice and the promise is properly implied the agreement by the master that he will assume the risk of injury pending the making of the repair.

If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize as against a servant an agreement express or implied on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant "to contract the master out" of the statute.² It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that. The cases upon the subject are by no means satisfactory, and, strange as it may seem, but few are in point. There is one English case which entirely supports our conclusion, and several dicta by English judges of like tenor. Several American cases on their facts also sustain the principle, though it must be confessed they do not very clearly state the true ground of their conclusion. There is one American case which is directly to the contrary, and possibly one other ought so to be regarded. There are several American cases that are said to be opposed to our view, but an examination of the facts in each will clearly distinguish them from the case at bar.

In the case of *Baddeley v. Granville*, 19 Q. B. Div. 423, the action was for the wrongful death of a miner, due to his employer's violation of a statute, and the defense of assumption of risk was set up. Section 52 of the coal mines regulation act of 1872 required a banksman to be constantly present while the men were going up or

² See Hand, J., in *Spring Valley Coal Co. v. Patting*, 210 Ill. 342 (1904), p. 253: "To excuse a mine owner from the said statute upon proof of the fact that the servant knew the mine owner was violating the act would be to repeal the statute."

down the shaft, but it was the regular practice of the defendant, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed, in coming out of the mine at night, by an accident arising through the absence of a banksman. It was held that the plaintiff's intestate did not, by continued service after he knew of the violation of the statute, thereby assume the risk of danger therefrom. The court say (page 426):

"An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation, people may come to what agreements they like, but as to future breaches of it there ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. If the supposed agreement come to this: that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him for the benefit of others as well as of himself, such an agreement would be in violation of public policy, and ought not to be listened to."

The judges deciding the case of *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 696, 703, had affirmed the view that assumption of risk did not apply to the neglect of a specific statutory duty imposed for the benefit of a class, but it was not the case before them. They said that the case of *Clarke v. Holmes*, 7 Hurl. & N. 937, 6 Hurl. & N. 349, proceeded on this ground, though it is difficult to find the ground stated in the opinions. *Durant v. Mining Co.*, 97 Mo. 62, 10 S. W. 484; *Grand v. Railroad Co.*, 83 Mich. 564, 47 N. W. 837; *Coal Co. v. Taylor*, 81 Ill. 590; and *Boyd v. Coal Co.* (Ind. App.) 50 N. E. 368,—were all cases where assumption of risk would have been a complete defense if applicable in case of a failure by the master to discharge a statutory duty to the servant, and the latter's express or implied acquiescence therein; and yet the servant was given judgment. The reasons stated in some of these cases for the conclusion are not entirely satisfactory, and in the cases from Illinois and Indiana no distinction is made between the doctrine of assumption of risk and of contributory negligence, but they are all authorities on their facts for our conclusion. The case of *Knisley v. Pratt*, 148 N. Y. 382, 42 N. E. 986, however, presented the precise question for decision, and the court of appeals held expressly that a servant, by continuing in the employment of a master who is violating a statute passed to protect the servant, does assume the risk of danger from such violation, and cannot make it the ground of recovery. This is followed by the circuit court of appeals for the Second Circuit in a New York case. *Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 79 Fed. 900. The Court of Appeals of New York, in *Huda v. Glucose Co.*, 154 N. Y. 474, 482, 48 N. E. 897, does not treat the question decided in the Knisley Case as controlling the case of servants acquiescing in and assuming the risk of a violation of a fire-escape statute by their master, and the court declined to decide it. The decision in the Knisley Case is largely based on the decision of *O'Maley v. Gas-*

light Co., 158 Mass. 135, 32 N. E. 1119, and *Goodridge v. Washington Mills Co.*, 160 Mass. 234, 35 N. E. 484. We think the learned Court of Appeals of New York failed to observe that the O'Maley and Goodridge Cases were not suits under a statute defining and enjoining a specific duty of a master for the protection of servants, but were suits under an employer's liability act, which relieved the servant from the burden of certain defenses by the master in suits for injury sustained by him while in his master's employ, but did not attempt to change the master's duty to the servant, or to change the standard of negligence between them as that was fixed at common law.³ Hence it was held by the supreme judicial court of Massachusetts that the doctrine of assumption of risk applied to suits under the statute as at common law, and *Thomas v. Quartermaine*, 18 Q. B. Div. 685, which was also a suit under an employer's liability act, was much relied on. And yet in *Thomas v. Quartermaine*, as we have seen, the two lord justices, forming the majority deciding the case, expressly pointed out that in a suit under a statute positively fixing a standard of duty the doctrine of assumption of risk could not be applied. The distinction between the employer's liability act and acts for the protection of servants in the nature of police legislation, like the act under consideration, is clearly shown in *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, where, though the court held that a servant might "contract the employer out" of liability under the former act, it was said that this could not be done in respect of a liability arising under a statute like the one at bar, passed for the protection of servants.⁴ The Knisley Case, which, in our judgment, was wrongly decided, and many others in which a right conclusion was reached, seem to us to confuse an agreement to assume the risk of an employment, as it is known to be to the servant, and his contributory negligence. That, under certain circumstances, the one sometimes comes very near the other, and cannot easily be distinguished from the other, may be conceded; but in most cases there is a broad line of distinction, and it is so in this case. For years employes worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is

³ Such is also *Birmingham, etc., Ry. Co. v. Allen*, 99 Ala. 359 (1893).

⁴ The distinction drawn in *Baddeley v. Gravelle* is between acts such as the Employers' Liability Act of 1880, which are passed solely for the servant's private benefit and are intended to confer upon him a merely personal privilege by removing from him certain disabilities, under which he, at common law, labored, and those acts where the State's interest in the enforcement of the precaution imposed on the master and the consequent security of the servant is clearly shown, as (usually but probably not exclusively) by the imposition of a penalty for its breach, thus marking such breach as an offense against the State and securing to the State the ability to, itself if necessary, enforce obedience to the act. In the first case the beneficiary can waive his purely private privilege, in the second he cannot sanction conduct declared to be detrimental to the State.

that action or nonaction in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences. The distinction has been recognized by the supreme court of the United States. In *Railway Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, the court said:

"The second instruction was properly refused because it confused two propositions,—that relating to the risks assumed by an employé in entering a given service, and that relating to the amount of vigilance that should be exercised under given circumstances."

In *Hesse v. Railroad Co.*, 58 Ohio St. 167, 169, 50 N. E. 355, Judge Shauck, speaking for the supreme court of Ohio, said:

"Acquiescenc with knowledge is not synonymous with contributory negligence. One having full knowledge of defects in machinery with which he is employed may yet use the utmost care to avert the dangers which they threaten."

The distinction is exceedingly well brought out in *Railway Co. v. Baker*, 33 C. C. A. 468, 91 Fed. 224, by Judge Woods, speaking for the circuit court of appeals for the Seventh Circuit. There the action was for damages against a railroad company for injury sustained by reason of a breach of a federal statute requiring the company to furnish grab irons. The statute, out of abundant caution, expressly provides that the continued service of the employé with knowledge of the breach of statutory duty by the company should not be regarded as an assumption of the risk. The court held that this proviso did not prevent the company from successfully maintaining the defense of contributory negligence. Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it.⁸ Many authorities hold that contributory negligence is a defense to an action founded on a violation of statutory duty, and this undoubtedly is the proper view. Such is the case of *Krause v. Morgan*, 53 Ohio St. 26, 40 N. E. 886, where the employé, in spite of a warning from his superior, and in the face of the most palpable danger, exposed himself to certain injury, and then sought to hold his employer liable because he had not employed the statu-

⁸ Where, however, the employment of children below a certain age in certain hazardous businesses is forbidden by statute, it is held that, since the object of the act is to protect children from the effect of their youthful incompetence and thoughtlessness, the contributory negligence of such a child does not bar him in an action against his master, *Lenahan v. Pittston Coal Co.*, 218 Pa. 311 (1907); *Stehle v. Jaeger Co.*, 220 Pa. 617 (1908).

tory methods of protecting him from the danger. In *Railway Co. v. Craig*, 19 C. C. A. 631, 73 Fed. 642, we held that the Krause Case was one of contributory negligence, and followed it as such. The syllabus confuses the difference between assumption of risk and contributory negligence, but the syllabus and opinion are, of course, to be restrained to the facts. The following cases, relied on by counsel for the railway company, were also cases of contributory negligence in suits for violation of specific statutory duty: *Coal Co. v. Esticvenard*, 53 Ohio St. 43, 40 N. E. 725; *Coal Co. v. Muir*, 20 Colo. 320, 38 Pac. 378; *Holum v. Railway Co.*, 80 Wis. 299, 50 N. W. 99; *Grand v. Railroad Co.*, 83 Mich. 564, 47 N. W. 837; and *Taylor v. Manufacturing Co.*, 143 Mass. 470, 10 N. E. 308. In the last two cases the distinction between contributory negligence and assumption of risk is clearly referred to.

For the reasons given, we think the court below was in error in holding that the plaintiff assumed the risk of injury from the failure of the defendant to comply with the statute passed for his protection, and that the case should have been submitted to the jury on the issue whether, assuming the unblocked guard rails and frogs as a condition of the situation, he used due care to avoid injury therefrom. Judgment reversed, at costs of the defendant, with directions to order a new trial.*

* *Accord*: *Fitzwater v. Warren*, 206 N. Y. 355 (1912), overruling *Kinsley v. Pratt*; *Spring Valley Coal Co. v. Patting*, 210 Ill. 342 (1904); *Green v. American Car, etc., Co.*, 163 Ind. 135 (1904); *Swick v. Aetna Cement Co.*, 147 Mich. 454 (1907); *Durant v. Coal Co.*, 97 Mo. 62 (1888); *Valjago v. Carnegie Co.*, 226 Pa. 514 (1910); *Hall v. West & Slade*, 39 Wash. 447 (1905), Root, J., dissenting in an elaborate opinion; *Welsh v. Barber Asphalt Co.*, 167 Fed. 465 (C. C. A. 9th Circ., 1909); *West v. Bayfield Mill Co.*, 144 Wis. 106 (1910), in which it was held that this is so, though the plaintiff, who knew that the required guard had been displaced, did not trouble himself to report the matter.

Contra: *Marshall v. Norcross*, 191 Mass. 568 (1906); *Anderson v. Nelson Lumber Co.*, 67 Minn. 79 (1896); *Rase v. R. R.*, 107 Minn. 260 (1909); *Languis v. Dunne Mills*, 25 R. I. 645 (1903); *Helmke v. Thilmann*, 107 Wis. 216 (1900); *St. Louis Cordage Co. v. Miller*, *ante* p. 455; in *Gillin v. R. R.*, 93 Me. 80 (1899), sometimes cited as *contra*, the question did not arise nor was it discussed, the point decided being that the statute alleged to have been broken was not obligatory upon the defendant. In *Denver, etc., R. R. v. Norgate*, 141 Fed. 247 (C. C. A. 8th Circ., 1906), the court, having adopted the view that assumption of risk does not arise out of an implied agreement in the contract between the parties, feel driven thereby to hold that the servant assumes the risk of the open violation of a statute passed for his protection, but compare *Britton v. Great Western Cotton Co.*, *ante*, p. 487. Where the servant knows of the risks created by the master's breach of an ordinance, it is held in *M. K. & T. R. R. v. Goss*, 131 Tex. Civ. App. 300 (1903), that he does not assume the risk thereof; *contra*: *Martin v. R. R.*, 118 Iowa, 148 (1902), and see *Camp v. R. R.*, 124 Iowa, 238 (1904).

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APPENDIX B

Workmen's Compensation Acts

In the last few years more than twenty-five states have passed workmen's compensation acts. These acts have either completely or to a large extent created a new and exclusive liability on the part of the employer, a new and exclusive right on the part of the employé suffering from injuries received in the course of his employment. Where such acts have completely covered the entire field of possible employment the first part of this Appendix discussing the common-law liability of a master to his servant is no longer of practical importance.

In many states, however, the acts are elective so that many of the employers and employés do not come within the compensation sections of such acts. In others only certain specified classes of ultra-hazardous industries are included. In others again, agricultural and domestic servants are included. In others compensation is only provided for employés in establishments employing more than a specified number of workmen. In these states, therefore, it is necessary for the student to study both the common-law liability of the employer toward his employé and the liabilities that are imposed upon him by such liability acts.

These acts vary greatly in many particulars:

(1) Some include all employments, some include only a part thereof.

(2) A few are compulsory, the majority are elective.

(3) While they all aim to give to the injured employé and to the dependents of those who are killed a definite percentage of such employé's wages for a fixed period of time, they differ both as to the percentage of wages given and in the length of time for which such compensation is to be paid.

(4) They differ in procedure by which the right of compensation is to be decided in case of dispute and the tribunal which is to pass upon contested claims.

(5) They differ in the manner in which the compensation is to be secured.

(6) They differ in their definitions of the injuries which are to be the subject of compensation and the conditions which determine the existence of the right to compensation in specific cases.

(7) They differ as to the effect upon the injured employé's right to compensation of his own misconduct contributing to bring about the injury.

(1) In some few States all employments are covered. In some

others, including New York, the acts whether elective or compulsory apply only to a specified list of ultra-hazardous employments, though some of these acts give to a state board the power to include employments not specified in the act within its operation if in their opinion they are ultra-hazardous. In the majority of states farm and domestic employes are excluded from the benefits of compensation, while in a number compensation is only provided for those employed in establishments in which more than a specified number of employes are employed.

(2) Compulsory acts, as their name implies, require all employers of the specified class to pay compensation provided irrespective of any consent on their part or the part of their employes. Elective acts, on the other hand, take away from the employer the benefit of the defenses of assumption of risk, of the fellow-servant doctrine and in whole or in part the benefit of the defense of contributory negligence, and provide that if the employe agrees to accept as his exclusive remedy such compensation, the employer may, by agreeing to pay compensation in accordance with the schedules contained in the act, escape the common-law liability so enlarged. In some acts the acceptance is assumed in the absence of express dissent. In others the compensation plan must be accepted by the positive act of one or both parties and in some of the acts the employer can only accept by taking out insurance against the liability which he assumes under the compensation plan.

(3) It would be idle to attempt to enter into a discussion of the schedules of the percentages of wages given under the various acts, they differ so greatly in different jurisdictions. The student in each jurisdiction must find from his own particular state Act the percentages and periods provided therein.

(4) The procedure provided, though differing in its character, is in general simple, speedy and free from technical difficulties. Here again the student must ascertain for himself the procedure in force in his own jurisdiction. In so far as the question is one for study in a law school course, it falls within the course in Legal Procedure or Practice rather than within the field of the law of Torts. The great majority of the acts create a commission as the tribunal which is to pass upon contested claims, the finding of such commission upon questions of fact is conclusive but an appeal is allowed to the courts upon matters of law. In Minnesota, Rhode Island and a few other states the English procedure has been adopted and the right to compensation is enforced by an action brought in the common pleas courts of those states.

(5) In the great majority of states the employer is made directly liable for the compensation provided in the act, though in some of these he is required to take out insurance against such liability or to satisfy the state commission that he is financially able to carry the liability himself. In others the employer is required to insure in a state insurance fund, which thereafter is solely liable for the payment of the compensation provided in the acts.

This is a matter of policy and here again the student in each

jurisdiction must ascertain for himself the policy adopted by his own legislation.

In (6) and (7) only do compensation acts present any problems which fall within or even approach the field of Tort law.

Therefore, the cases collected in this part of the Appendix deal with,

- (1) the language used in defining the injury;
- (2) the language used in the various acts in defining the circumstances under which such injury must be received in order that the sufferer may be entitled to compensation therefor;
- (3) the construction put upon the phrase used to define the nature of the misconduct which will bar an injured employé from recovering compensation;
- (4) and last, cases dealing with the interpretation of the term "casual employment," a term used in most if not all acts to indicate a class of persons excluded from the benefits therein provided.

While the acts now in force in the United States differ largely in the various particulars hereinbefore-mentioned, and while some have adopted the system of compensation in force in Germany, others, those in force in England, and others against those in force in other European countries, and while the system of administration and procedure is in some cases copied from those existing in the one, and in others those existing in the other European countries, yet all unite in copying literally or in part the definitions contained in the English Workmen's Compensation Acts of 1897 and 1906. Therefore the sections in the English acts containing these definitions will be used as a starting-point. And as the American acts have not been in force so long as to have created any considerable body of precedence, the cases given will be in the main those decided by British Courts construing and applying the provisions of the British Act and the Colonial Acts which are themselves copies thereof.

CHAPTER I.

Personal Injury by Accident Arising Out of and in the Course of the Employment.¹

SECTION 1.

"Personal Injury by Accident."²

(a) "Personal injury."

ISMAY, IMRIE & CO. *v.* WILLIAMSON.

House of Lords, 1908. L. R. 1908, A. C. 437.

In July, 1907, the respondent's husband died while employed as a trimmer on the appellant's steamship at sea in the Atlantic. In an arbitration held in the county court of the county of the city of Belfast an entry in the log-book was put in stating that "at 1 P. M. the trimmer was brought on deck suffering from heat-stroke, temperature 106: he was placed in hospital for treatment; ice was applied and the temperature reduced to 101, when he became very violent, having to be held down. At 3 P. M. he died; cause of death was heat-stroke and exhaustion." The medical evidence is given in the judgments of Lord Ashbourne and Lord Macnaghten.

¹"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule of the Act." Sec. 1 (1) of the British Workmen's Compensation Act of 1906, 6 Edw. VII, ch. 58, L. R. 1906, "Statutes" p. 326. For a discussion of the British decisions construing and applying this section, see the editor's article on "A Problem in the Drafting of Workmen's Compensation Acts," 25 Harv. L. R. 328, 401, 517 (1912), and see also his article on "Some Recent Decisions Under the Workmen's Compensation Acts of Massachusetts and Michigan," 14 Col. L. R. 563, 648 (1914). See, however, Sec. 301 of the Workmen's Compensation Act of 1915 of Pennsylvania.

²This exact phrase is used in the Workmen's Compensation Acts of Arizona, Minnesota, Nebraska, New Jersey, Oregon and Rhode Island. The words "personal injuries" without the qualifying phrase "by accident" are used in the acts of California, Connecticut, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Nevada, Ohio and Texas. The phrase "accidental injuries" is used in the Illinois Act, the phrase "accidental personal injuries" is used in the Maryland and New York Acts, in Washington (Sec. 5) "every workman who shall be injured" is given compensation, while in Wisconsin (Sec. 2394-3), liability for compensation exists "for any personal injury accidentally sustained" by an employé who "at the time of the accident" is "performing service," etc.

The Court of Appeal in Ireland (Sir Samuel Walker L. C. and Fitzgibbon L. J., Holmes L. J. dissenting) affirmed the decision of the county court judge, who held as a fact that death was caused by heat coming from the boiler; that it was an accident within the meaning of the statute; and that the respondent was entitled to compensation. Hence the present appeal.

LORD LOREBURN, L. C. My Lords, I agree with the judgment of the Court of Appeal.

The county court judge has found that this man died from an accident. There does not seem to me reason for dissenting from that view.

To my mind the weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who has died from a heat-stroke was by physical debility more likely than others so to suffer can have nothing to do with the question whether what befell him is to be regarded as an accident or not.

In the case of *Fenton v. Thorley*, (1903) A. C. 443, 448, the meaning of the word accident was very closely scrutinized. That case stands as a conclusive authority, and I would not depart from it if I could, nor need I repeat what was there said. The only question is of applying the law there laid down to the particular facts of this case.

In my view this man died from an accident. What killed him was a heat-stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt, threatened, but generally averted by precautions which experience, in this instance, had not taught. It was an unlooked-for mishap in the course of his employment. In common language, it was a case of accidental death.

I feel that in construing this Act of Parliament, as in other cases, there is a risk of frustrating it by excess of subtlety, which I am anxious to avoid.

LORD ASHBOURNE. My Lords, In this case I think that the decision of the Court of Appeal in Ireland was correct and that the appeal should be dismissed.

There is no dispute as to the facts of the case. He was employed as a trimmer on board the *Majestic*. At the time of the accident he was working in a stokehole opposite the boiler, he received a heat-stroke from the rays of heat from the boiler impinging on his body, he became exhausted, and died in a few hours.

Was this an accident arising out of and in the course of his employment? With great deference to those who hold a contrary opinion, I can myself see no room for serious doubt on the subject. Everything was in the course of his employment and arising out of it. But for the boiler and the heat-stroke, and the speedy exhaustion it caused, there would have been no accident.

If the Act is to be interpreted according to its "ordinary and popular meaning," as Lord Halsbury said was right in *Brintons v. Turvey*, (1905) A. C. 233, would not the generality of mankind say that what occurred was an injury caused by an accident?

Although a heat-stroke may be called a disease, it is in this case, in my opinion, a disease directly caused by an accident arising out of or in the course of an employment, particularly dangerous to Williamson, in consequence of his weak state of health. Its not being scheduled as an industrial disease in the Act of 1906 does not affect the question, for the Act expressly provides that "nothing shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply, if the disease is a personal injury by accident within the meaning of the Act." I do not at all say that all diseases arising out of or in the course of employment should be regarded as a personal injury by accident, but I am of opinion that under the circumstances of this case and its facts Williamson was killed by a personal injury by accident, and that the appellants are accordingly liable.

In my opinion the appeal should be dismissed with costs.

LORD MACNAGHTEN. My Lords, that the illness by which the deceased lost his life was one arising out of and in the course of his employment can not be disputed. But I agree with Holmes L. J. that it does not come under the description of a "personal injury by accident." That expression as it seems to me would be equally applicable or equally inapposite in the case of an attack of bronchitis or pneumonia brought on by a sudden and violent chill disregarded or neglected at the outset.

The work of a trimmer is not heavy in itself. It is, no doubt, trying work, owing to the heated atmosphere of the stokehole where trimmers work, raking out the ashes of the furnaces. The men work in shifts, four hours on and eight hours off. The deceased had no experience of such work. He got through two shifts. On his third turn, after about an hour's work, he had a "heat-stroke," as it is called. He went on till he dropped in a faint. He was carried to the hospital, recovered partially, then became violent, and died from exhaustion two hours after leaving the stokehole. Was that an injury by accident in the ordinary sense of the expression? I think not. The death was due to the physical state of the workman and "the nature" of the employment, to use the language of section 8, sub-section 6. It was, I think, just what anybody would have expected who saw the man and knew what a trimmer has to do. Add the fact that the man was wholly inexperienced, ignorant of what ought to be done in case of emergency, and the result would be a foregone conclusion.

I should be for allowing the appeal. But as your Lordships take a different view, the appeal will, of course, be dismissed with costs.¹

Order of the Court of Appeal affirmed and appeal dismissed with costs.

¹ In *Brinton's Limited v. Turvey*, L. R. 1905, A. C. 230, compensation was granted to the dependents of a workman who died from anthrax, a bacillus of which alighted in his eye while he was sorting infected wool. The Court of Appeals, L. R. 1904, 1 K. B. 328, laid great stress on the fact that the impact of the germ in the eye was a violation, though one microscopically

(b) "By accident."

CLOVER, CLAYTON & CO., LIMITED v. HUGHES

House of Lords, 1910. Law Reports, 1910, Appeal Cases.

LORD LOREBURN L. C. My Lords, in this case a workman, suffering from an aneurism in so advanced a state of disease that it might have burst at any time, was tightening a nut with a spanner, when the strain, quite ordinary in this work, ruptured the aneurism and he died. This is a mere summary of the facts. They and the learned county court judge's conclusions from them are stated fully in his instructive judgment. In what I am about to say I take the facts as he found them in extenso and rely upon them.

This man died from the rupture of an aneurism and "the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal." Again, "the aneurism was in such an advanced condition that it might have burst while the man was asleep, and a very slight exertion, or strain, would have been sufficient to bring about a rupture." These are the findings and they bind us.

The first question here is whether or not the learned judge was entitled to regard the rupture as an "accident" within the meaning of this Act. In my opinion he was so entitled. Certainly it was an "untoward event." It was not designed. It was unexpected in what seems to me the relevant sense, namely, that a sensible man who knew the nature of the work would not have expected it. I can not agree with the argument presented to your Lordships that you are

small, of the workman's body. Later cases, however, draw no distinction between cases where a germ invading the body causes infection and those where disease is contracted in any other way. So a sun-stroke received by a sailor painting a vessel in a dry-dock at a tropical port, has been held an injury within the terms of the act, *Morgan v. Zeneida*, 25 T. L. R. 446 (1909), 3 B. W. C. C. 19; as has kidney disease due to a chill contracted while working waist deep in water, *Sheeran v. Clayton & Co.*, 44 Ir. T. L. R. 52 (1909), 3 B. W. C. C. 583; pneumonia due to chills similarly caused, *Alloa Coal Co. v. Drylie*, 1913 Sess. Cases (Scotland) 549, 6 B. W. C. C. 398; *Coyle v. John Watson, Ltd.*, 30 T. L. R. 501 (1914 House of Lords) reversing the decision in the Court of Sessions, 1913 Sess. Cases 593; and pneumonia caused by inhalation of poisonous gas, *Kelly v. Auchenlea Coal Co., Ltd.*, 1911 Sess. Cases 864, 4 B. W. C. C. 417. See however, *M'Millan v. Singer Sewing Machine Co.*, 1913, Sess. Cases 346, 6 B. W. C. C. 345, and the vigorous dissenting opinion of Lord Salvesen in *Alloa Coal Co. v. Drylie*, *supra*.

The Supreme Judicial Court of Massachusetts has construed the term "personal injury" used in the Compensation Act as including disease as well as injury to the physical structure of the body, *Hurle's Case*, 217 Mass. 223 (1914); *Johnson's Case*, 217 Mass. 388 (1914); *Stone v. Traveller's Insurance Co.*, p. 470 of the "Report of Cases under the Massachusetts Compensation Act from June, 1912, to June 30, 1913." The question is left open in *Liondale Bleach, etc., Works v. Riker*, 85 N. J. L. 426 (1914); *Adams v. Acme White Lead Works*, 148 N. W. 485 (1914 Michigan), the disease in each case being alleged to have been caused by a continuous exposure to unsanitary conditions during the whole period of employment. See *Eke v. Hart Dyke*, *infra*.

to ask whether a doctor acquainted with the man's condition would have expected it. Were that the right view, then it would not be an accident if a man very liable to fainting fits fell in a faint from a ladder and hurt himself.

LORD MACNAGHTEN. My Lords, in this case your Lordships have heard a very able and ingenious argument upon the construction of the 1st section of the Workmen's Compensation Acts. I need hardly say that it is not from any want of respect to the learned counsel who advanced that I pass that argument by. It has been disposed of already. It was advanced and rejected in the case of *Fenton v. Thorley*, (1903) A. C. 443. There the Court of Appeal had held that if a man meets with a mishap in doing the very thing he means to do the occurrence can not be called an accident. There must be, it was said, an accident and an injury: you are not to confuse the injury with the accident. Your Lordships' judgment, however, swept away these niceties of subtle disquisition and the endless perplexities of causation. It was held that "injury by accident" meant nothing more than "accidental injury" or "accident," as the word is popularly used. It is not perhaps quite accurate to say that in that case a definition of the term "accident" was hazarded. It would be more correct to say that the decision was that the word "accident" was to be taken in its ordinary and popular sense. Some of the noble and learned Lords who gave judgment explained what they understood to be the ordinary meaning of the word, and I can not but think that the explanations given, varying slightly in expression, are substantially correct.

The fact that the man's condition predisposed him to such an accident seems to me to be immaterial. The work was ordinary work, but it was too heavy for him. It must be taken on the finding of the learned county court judge that the accident was unexpected by the workman. It can hardly be supposed that he intended to kill himself. The fact that the result would have been expected, or indeed contemplated as a certainty, by a medical man of ordinary skill if he had diagnosed the case is, I think, nothing to the purpose. An occurrence I think is unexpected if it is not expected by the man who suffers by it, even though every man of common sense who knew the circumstances would think it certain to happen. All accidents, I suppose, may be divided into two classes; those which are due to one's own fault, and those which are not. Accidents due to a man's own fault are for the most part the result either of inadvertence or miscalculation. If a man miscalculates his powers and so fails in what he attempts to do and, it may be, injures himself, he has probably plenty of friends who will tell him (at any rate after the event) that they knew exactly what would happen. But still, as it seems to me, the untoward occurrence would popularly be called an accident.

I am of opinion that the judgment appealed from is right, and that the appeal must be dismissed with costs.

LORD ATKINSON. If the external conditions which surround and the external influences which act upon a workman at the time he receives an injury be the normal conditions and influences which

would surround and act upon any one engaged in the discharge of the normal duties of employment such as his, it could not, I think, be contended that anything "unlooked for" or "unexpected" had come to pass in those conditions and influences. And if the physical state of the workman be such that those acquainted with it, and capable of forming an intelligent opinion upon the effect which those influences would, under such conditions, produce upon him, regard the injury as the certain or highly probable consequence of their action, I fail to see how the injury could be regarded as an accident.

The death of the deceased was, it appears to me, no more an accident than if, had he been a butler, he had died walking slowly up the stairs of the house in which he served, or, had he been a coachman, he had died while slowly mounting to his box. It may possibly be that it would be better, in the interest of workmen, that they should be entitled to compensation for all injuries which arise out of and in the course of their employment however caused, though that is far from clear, since it might result in depriving of employment all who were in any way unsound or past their prime; but while the word "accident" remains in the statute, force and meaning must be given to it in construing the statute, and, much as one must sympathize with the claimant, I for my part am unable to see that anything which was not normal and most probable, if not certain, befell the deceased. I therefore think that there was no evidence upon which the county court judge, as a reasonable man, could legitimately find as he has found, and that the appeal should be allowed.¹

¹ The earlier cases required that there must have been something unusual and unexpected in the external influences to which the sufferer was subjected in the course of his employment. No injury was regarded as sustained by accident where the workman was harmed while doing the very work he was employed to do under conditions usual thereto. No compensation was awarded unless there was some departure from the ordinary operation of the business or some unusual condition of the plant; it was not enough that, because of some peculiar physical condition of the workman, permanent or transitory, known to him or not known to him, the work which he did not expect to injure him, in fact proved harmful; there must be some factor external to the claimant's physical condition. Even the most recent decisions of the Scottish Court of Sessions show a marked tendency toward the position taken in the English cases prior to the decision in the principal case, see *Watson v. Brown*, 1913 Sess. Cases 593, 6 B. W. C. C. 416, reversed by the House of Lords, 30 Times L. R. 501 (1914), and *Kerr v. Ritchie*, 1913 Sess. Cases 613, 6 B. W. C. C. 419.

The courts, however, were prone to regard rather minute departures from the ordinary course of the employment as being sufficient to amount to an unexpected external event. So it was held that a strain received while lifting a pile of boards which had been stuck together by ice and whose removal thereby required an unusual effort was an accident, *Timmins v. Leeds Forge Co.*, 83 L. T. 120, 16 T. L. R. 521, 2 W. C. C. 10 (1900). And so it was held that the claimant might recover compensation where his hand was jarred by a blow inaccurately struck by a fellow workman on the tool which the claimant was holding, *Lloyd v. Sugg & Co.*, (1900) 1 Q. B. 481, 486, 2 W. C. C. 5; the departure from the usual operation of the business might be some unusual act of the servant himself if done in the prosecution of the business, and this act might be some careless act of his own,—an unintentional slip, or an act intentionally done but whose results, owing to some

TRIM JOINT DISTRICT SCHOOL BOARD MANAGEMENT
v. KELLY.

House of Lords, 1914. 30 Times L. R. 453.

Appeal, from the decision of the Court of Appeal in Ireland.

The respondent claimed compensation as sole dependent for the death of her son. The son was employed by the appellants as an assistant master in the Trim District School, which was established as a school for training children of the Meath and other union workhouses in industrial pursuits. It was his duty to superintend the boys in school and in the playground. On February 12, 1912, the boys, who were angry with the master because he had prevented them from playing hockey in the school yard and because he had caught one of them stealing, planned an attack on him. They collected in a shed attached to the school, armed with hockey sticks, sweeping brushes, and scrubs—the last weapon consisting of a heavy block of wood attached to a brush-handle. The master came down from the school and walked along the shed. As he turned to come back one of the boys struck him on the head with a scrub and another struck him with a sweeping brush, inflicting such severe injuries that he died on the same day.

The County Court Judge held that the assault was an accident

miscalculation, were not foreseen or designed, *Boardman v. Scott & Whitworth*, (1902) 1 K. B. 43, 4 W. C. C. 1, where a workman was required to move a beam from a loom and in lifting it he balanced it unevenly upon his shoulder. In order to get it into a position of equilibrium, he gave it an extra lift, the strain of which lacerated the muscles in his side; it was held that this was an injury by accident, the improper and unusual manner in which the workman himself had originally balanced the beam upon his shoulder being taken to be an unusual condition of the labor which the servant had not expected to encounter.

An injury is by accident, though similar injuries have been previously sustained by the claimant or his co-workers under similar conditions, and though the recurrence thereof is likely, if its recurrence at the particular time was not anticipated by the victim, *Neville v. Kelly Bros., etc.*, 13 Brit. Col. 125 (1907). In one class of cases there is a tendency to regard as accidental injuries which the workman probably foresaw as very likely to result from some particular action intentionally undertaken. There are cases where a workman voluntarily encounters a very serious risk of injury in an effort to save his master's property from injury or to rescue a fellow workman from peril, and so, if successful, incidentally protecting his employer from liability to make compensation or diminishing the amount thereof, *Rees v. Thomas*, (1899) 1 Q. B. 1015, 1 W. C. C. 9, workman injured while trying to stop his employer's runaway horses; *Hapelman v. Poole*, 25 T. L. R. 155, 2 B. W. C. C. 48 (1908), menagerie attendant killed while trying to drive escaped lions back to their cage; *Matthews v. Bedworth*, 1 W. C. C. 124 (County Ct., 1899), miner killed in going down shaft, after being warned of danger, in order to rescue fellow miner overcome by choke damp; *London & Edinburgh Shipping B. v. Brown*, (1904-1905) Session Cases 488, 7 Fraser 488 (Ct. Sess., 1905), dock laborer killed in an attempt to rescue fellow worker overcome by noxious gas in the hold of a vessel which he was unloading. But see the strong dissent of Lord Kyllachy in the last given case. In none of these cases was the injury inevitable, though in most of them the danger was very great.

arising out of and in the course of the employment of the master, and that the accident caused his death. He therefore made an award in favor of the respondent. The Court of Appeal (the Lord Chancellor of Ireland, Lord Justice HOLMES, and Lord Justice CHERRY) affirmed the decision of the County Court Judge.

LORD HALDANE, L. C. It was not in dispute that the respondent was partly dependent on her son, or that if she was entitled to compensation for his death the amount awarded, £100, was a proper amount. The proceedings out of which the appeal arose were taken under the Act referred to, and assumed the form of an application for arbitration, which was heard by the County Court Judge of the county of Meath.

The deceased John Kelly, who was employed by the appellants, was on February 12, 1912, superintending the boys in the school at exercise in the school yard when he was assaulted by several of them. He died as the result of his injuries. The assault was pre-meditated and the outcome of a conspiracy among some of the boys to injure Kelly, who had punished or threatened to punish them, and who on the occasion in question was remonstrating with them.

After referring to the findings of the County Court Judge, the Lord Chancellor said that he wished before alluding to the authorities on the point to look at the question as if it were a new one. It seemed to him important to bear in mind that "accident" was a word the meaning of which might vary according as the context varied. In criminal jurisprudence crime and accident were sharply divided by the presence or absence of *mens rea*. But in contract such as those of marine insurance and of carriage by sea, that was not so. In such cases the maxim *In jure non remota causa sed proxima spectatur* was applied. He need only refer to what was laid down by Lord Herschell and Lord Bramwell, when overruling the notion that a peril or an accident in such cases was what must happen without the fault of anybody, in *Wilson v. The Owners of Xantho* (3 The Times L. R. 766; 12 App. Cas. 503).

It was therefore necessary, in endeavoring to arrive at what was meant by "accident," to consider the context in which the word was introduced. The scope and purpose of that context might make the whole difference.

After alluding to the Workmen's Compensation Act, 1906, and observing that its principle was to impose on the employer a general liability to pay compensation in case of personal injury by accident arising out of and in the course of the employment when caused to a workman, he said that, if he had to consider the principle of the statute as *res integra*, he would be of the opinion that the principle was one more akin to insurance at the expense of the employer of the workman against accidents arising out of and in the course of his employment, than to the imposition on the employer of liability for anything of which he might reasonably be made answerable on the ground that he ought to have foreseen and prevented it. He thought that the fundamental conception was that of insurance in the true sense. And if so it appeared to him to follow that in giving a mean-

ing to "accident" in its context in such a scheme one would look naturally to the *proxima causa*, of which Lord Herschell and Lord Bramwell spoke in connection with marine insurance, the kind of event which was unlooked for and sudden, and caused personal injury, and was limited only by this, that it must arise out of and in the course of the employment. Behind this event it appeared to him that the purpose of the statute rendered it irrelevant to search for explanations or remoter causes, provided the circumstances brought it within the definition.

No doubt the analogy of the insurance cases must not, as Lord Lindley pointed out in his judgment in *Fenton v. Thorley*, (1903) A. C. 443, be applied so as to exclude from the cause of injury the accident that really caused it merely because an intermediate condition of the injury—in that case a rupture arising from an effort voluntarily made to move a defective machine—had intervened. If, so far as the workman was concerned, unexpected misfortune happened and injury was caused, he was to be indemnified. The important limitation which the statute seemed to him to impose in the interest of the employer, who could not escape from being a statutory insurer, was that the risk should have arisen out of and in the course of the employment.

It was, however, argued for the appellants that the definition of what accident meant in the Act was determined differently by the judgments in this House in the case of *Fenton v. Thorley* (*supra*), above referred to. But the House was not there considering an injury unexpected by the workman, but caused by the intentional act of another person. Nor did he think that the expressions used in the judgments excluded such a case from the definition actually given of accident. After saying that the element of haphazard was not necessarily involved in the word "accidental," Lord Macnaghten defined "accident," as used in the Act "in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." He thought that the context showed that in using the word "designed" he was referring to designed by the sufferer. Nor did the judgment of Lord Lindley, when closely considered, appear to him to support the argument for the appellants.

His Lordship then considered in detail the judgment of Lord Lindley and referred to subsection 2(b) of section 1 of the Act, which he said confirmed the view that "accident" was used in that section as including a mishap unexpected by the workman, irrespective of whether or not it was brought about by the wilful act of some one else. In his opinion, the language of the judgments in *Fenton v. Thorley*, so far from being authority which supported the argument addressed to their Lordships from the Bar for the appellants, really assisted the contention of the respondent. For that language laid stress on the wide-reaching scope of the statute in question. It showed how that scope extended the liability it embraced beyond liability for negligence, and covered a field akin to statutory insurance against injury to the workman arising out of

and in the course of his employment, provided that that injury was something not expected or designed by the workman himself. He thought that this conclusion as to what the Legislature intended by its language was strengthened by section 8, which placed disablement from certain industrial diseases on the same footing as the happening of an accident. The provision seemed to show that what the legislature had in view as a general object to be attained was the compensation of the workman who suffered misfortune.

If the object of this statute were as wide as he gathered from the study of its language, its construction must, as it appeared to him, be that "accident" included any injury which was not expected or designed by the workman himself. If so the Court of Appeal in England was right in its decision in *Nisbet v. Rayne* (26 Times L. R., 632; (1910) 2 K. B. 689) that the definition extended to a case of death by murder, and the Court of Appeal in Ireland was right in *Anderson v. Balfour*, (1910) 2 Ir. 497, and in the present case in taking a similar view of the meaning of "accident." To take a different view appeared to him to amount, in the language of Mathew, L. J., in *Challis v. L. and S. W. R. Company* (21 The Times L. R., 486; (1905) 2 K. B. 154) to the reading into the Act of a proviso that an accident was not to be deemed within it if it arose from the mischievous act of a person not in the service of the employer. The Second Division of the Court of Session refused to follow these decisions in *Murray v. Denholm*, (1911) S. C. 1807. But he thought, for reasons that he had already given, that the Lord Justice Clerk misinterpreted Lord Macnaghten's judgment in *Fenton v. Thorley* (*supra*) when he read it as meaning that the expression "accident" could not be applied to an accident arising out of wilful crime. And he was confirmed in his view of the unrestricted rendering of the meaning of the word which he attributed to Lord Macnaghten by reading his subsequent judgment in *Clover, Clayton & Co. v. Hughes*, (1910) A. C. 242, where he spoke of the "far-reaching application of the word," and intimated that what was held in *Fenton v. Thorley* (*supra*) was that "injury" and "accident" were not to be separated and that "injury by accident" meant nothing more than accidental injury or accident as the word was popularly used.

In the present case the facts left little doubt on his mind that from one point of view at all events Kelly met with what might properly be described as an accident, and it was not the less an accident in an ordinary and popular sense in which the word was often used merely for the reason that it was caused by deliberate violence. For the rest, he had no doubt that there was evidence on which the arbitrator could find, as he did, that the accident so defined arose out of, and in the course of, the employment.

He was therefore of opinion that the appeal should be dismissed with costs.

LORD LOREBURN concurred. He said that etymologically the word accident meant something which happened—a rendering which was not very helpful. They were to construe it in the popular sense, as plain people would understand it, but they were also to construe

it in its setting, in the context, and in the light of the purpose which appeared from the Act itself. Now, there was no single rigid meaning in the common use of the word. Mankind has taken the liberty of using it, as they used so many other words, not in any exact sense, but in a somewhat confused way, or rather in a variety of ways.

People said that some one met a friend in the street quite by accident, as opposed to appointment, or omitted to mention something by accident, as opposed to intention, or that he was disabled by an accident, as opposed to disease, or made a discovery by accident, as opposed to search or reasoned experiment. When people used this word they were usually thinking of some definite event which was unexpected, but it was not so always, for one might say of a person that he was foolish as a rule and wise only by accident. Again, the same thing, when occurring to a man in one kind of employment, would not be called accident, but would be so described if it occurred to another not similarly employed. A soldier shot in battle was not killed by accident in common parlance. An inhabitant trying to escape from the field might be shot by accident. It made all the difference that the occupation of the two was different. In short, the common meaning of this word was ruled neither by logic nor by etymology, but by custom, and no formula would precisely express its usages for all cases.

Mr. Sankey ably urged upon their Lordships that this man could not have been killed by accident because he was struck by design. Suppose some ruffian laid a log on the rails and wrecked a train, was the guard who had been injured excluded from the Act? Was a gamekeeper who was shot by poachers excluded from the Act? There was design enough in either case, and of the worst kind. In either case he would have thought, if the nature of the man's employment was looked at, it might be said he was injured by what was accident in that employment. When Lord Macnaghten, in *Fenton v. Thorley* (*supra*) spoke of the occurrence being "undesigned," he thought he meant undesigned by the injured person. One could not imagine its being said of a suicide that he was killed by accident. He found that to treat the word accident as though the Act meant to contrast it with design would exclude, from what he was sure was an intended benefit, numbers of cases which were to his mind obviously within the mischief. That made him realize the value of the old rule about construing a remedial statute. Just as in the case of the guard or the gamekeeper, so here this man was injured by what was accident in the employment in which he was engaged. It was not the less so that the person who inflicted the injury acted deliberately. He also came to the conclusion that there was evidence to support the finding of the County Court Judge that the accident arose out of the employment.

LORD DUNEDIN differed. After discussing Lord Macnaghten's definition of "accident," in *Fenton v. Thorley* (*supra*), he said that there was one matter of completely general application which he conceived was authoritatively decided by Fenton's case (*supra*) and that was that the expression "injury by accident" in the statute must

be interpreted according to the meaning of the words in ordinary popular language.

Now there was no authoritative test of what was the meaning of popular language. On such a matter they were bound to take their own personal experience as persons well acquainted with popular language. For himself, he confessed that it seemed so clear that in popular language the injury in this case was not an injury caused by accident, that it was difficult for him to use terms which might not appear relevant in respect to those who had expressed themselves otherwise.

It must be conceded that the injury here was caused by design—*i. e.*, that there was an intention to inflict an injury. To his thinking, the word accident in popular language was the very antithesis of design. He brushed aside at once all argument as to acts of conscious volition. The design must be design to inflict injury, not design to do the act which might, as it turned out, be the cause of the injury. Popular language bore him out in this direction. If a workman kicked a brick off a scaffold and it happened to hit and injure a man below, popular language would say he had met with an accident. Popular language in this case, he maintained, would never say that Kelly met his death by accident. It would say that he was murdered. In so doing it might not be positively accurate. The crime as a crime might possibly not be murder, but only manslaughter, as indeed, a jury found. But whether murder or manslaughter mattered not. Both terms were negative of accident in the popular sense. And here he would like to say that in his view criminal law had nothing to do with the matter. Criminal law had to do with *mens rea*. When one said that popular language would describe this as murder, that was because the narrator of what had happened would naturally use a positive expression which according to his view fitted the facts. The point was that he would not use the expression "accident," because he would consider it inappropriate. Suppose A attacked B and was shot by B in self-defense, there would be no *mens rea* in B, and no crime. None the less, no one popularly would describe A's death as a death by accident.

He wished to add a word as to the scope of the statute. It was said to aid the argument in favor of the enlarged meaning of accident to consider that the statute introduced a system of compulsory insurance of the workman by his employer. Again, with great deference, he could not see that by this statute the argument was forwarded one whit—insurance let it be—but insurance against what? In a contract one found an answer to this question in the terms of the policy. Here the policy was the Act of Parliament and by an interpretation of its terms one must stand or fall. So that it only came back to the same question. What was the meaning of the word as used? As for further speculations, these, he humbly thought, were entirely outside their province. He would only say that if judges were to indulge in speculations and reminiscences, they would probably find that such speculations and reminiscences did not altogether tally. But clearly they had nothing to do with

such matters. Parliament might have left out the word accident. It did not do so. On the contrary, it put it in, as Lord Macnaghten said, with the approbation of all the other lords, in Fenton's case (*supra*), "parenthetically, as it were, to qualify the word injury, confining it to a certain class of injuries and excluding other classes," and they had to interpret it. And in interpreting it he would like to say that he agreed with his noble and learned friend, Lord Atkinson whose judgment he had the advantage of reading, that the interpretation of accident given by the appellants really cut the word accident out of the Act.

On the whole matter he put to himself the entire question in the words of the statute, Was what Kelly suffered an injury by accident arising out of and in the course of his employment? And remembering the repeated decisions of this House that he was to take the language in the ordinary popular meaning he answered unhesitatingly, No.

LORD ATKINSON and LORD PARKER of Waddington agreed with LORD DUNEDIN.

LORD SHAW of Dunfermline and LORD READING agreed with the LORD CHANCELLOR and LORD LOREBURN.

In the result the appeal was dismissed.¹

EKE *v.* HART-DYKE.

Court of Appeal, 1910. Law Reports 1910, 2 K. B. 677.

Appeal against the award of the judge of the county court of Bromley, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether the workman's death was caused by accident or disease?

Proceedings for compensation having been taken, the county court judge came to the conclusion that the deceased died from the results of poisoning contracted while working on the cesspools, and

¹ *Accord: Risdale v. Kilmarnock*, 59 Sol. Journal & Weekly Rep. 145 (C. A. Eng., 1915), engineer of steam trawler injured by the blowing up of the vessel which struck an enemy's floating mine, and *Thom v. Humm & Co.*, 44 Co. Ct. Chron. 535 (1914); *In re Evans*, Bulletin Ind. Com. Ohio, Vol. 1, No. 7, watchman killed by burglars. The Ohio Industrial Commission has held that the dependents of a female stenographer shot while taking dictation by a discarded suitor, a fellow employé, were entitled to compensation, the injury being received in the course of employment and the Ohio Act not requiring that it should "arise out of" the employment. *In re Schwenlein*, Bulletin of the Industrial Com. of Ohio, Vol. 1, No. 7, p. 136 (1914). See also *In re Clark*, same Bulletin, p. 125 (1914); employé while at work killed by a fellow workman who quarreled with him over the possession of a tool; *In re William Wharton*, opinions of the Solicitor of the Department of Labor and Commerce 250, and the ruling of the Washington Industrial Commission in its 1st Report 476 to the effect that compensation was payable to a street car conductor injured by unruly passengers whom he was trying to keep in order.

he made an award in favor of the applicant. The respondent appealed. The appeal was heard on July 12.

COZENS-HARDY M. R. That leaves only this question: Was there "an injury by accident arising out of and in the course of the employment"? In my opinion there was not. This Court and the House of Lords have been engaged again and again in discussing that word "accident," and so far as I am aware neither this Court nor the House of Lords has ever attempted to say that a mere disease without accident, not attributed to something which may properly be called an accident, entitles a workman to compensation under the Act. No doubt there have been some cases which were very near the line. There was the case which is always cited on these occasions of *Brinton, Limited v. Turvey*, (1905) A. C. 230, but in that case the decisions, both in this Court and in the House of Lords, entirely turned upon this, that it was found as a fact by the learned county court judge, who was the judge of fact, that the anthrax of which the man died was due to the circumstance that at a particular time and at a particular place a particle came from the wool with which he was dealing, settled in the man's eye, and set up the disease which caused his death. In the face of that particular finding of fact the Court held that it was an accident, and that it was an accident which resulted in his death from anthrax. But I think all the judges carefully abstained from lending color to the suggestion that a mere disease which you could not say was contracted at a particular time and at a particular place by a particular accident was an accident which entitled a man to compensation.

I have thus far made no mention of one portion of the Act which seems to me to be of great value as explaining the position. Under the Act of 1896 disease apart from accident did not entitle a workman to compensation. That was decided again and again. But by section 8 of the Act of 1906 the provisions of the Act are applied to certain scheduled diseases, which are extended from time to time by orders made by one of the Government departments, and the section provides that where the certifying surgeon certifies that the workman is suffering from one of the scheduled diseases, and is disabled from earning full wages, or is suspended from his usual employment, or has died from such disease "and the disease is due to the nature of any employment in which the workman was employed at any time within twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependents shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment." That is to say, true, it is not an accident, but the disease shall be treated as though it were a personal injury by accident; disablement is to be treated as the happening of the accident, not when the original source of the mischief got into the man's system, but the moment at which, and no earlier than the moment at which, the actual disablement takes place. That for the purpose of the scheduled diseases is treated as "an accident." In my opinion, there-

fore, except in the case of these industrial or scheduled diseases, unless the applicant can indicate the time, the day, and circumstance, and place, in which the accident has occurred by means of some definite event, the case can not be brought within the general purview of the Act, and does not entitle the workman or his dependents to compensation.

In my opinion the learned judge below was wrong in holding that the workman died from the results of poisoning contracted while working on the cesspools, whether it is called ptomaine or toxin poisoning. That seems to me to be a finding not sufficient to bring the case within what was decided in *Brintons, Limited v. Turvey*, (1905) A. C. 230, and is not in any way sufficient to enable us to say as a matter of law that there is any accident here within the meaning of the Act.

In my opinion this appeal must be allowed.

FARWELL, L. J. The question what has happened is a question of fact for the judge, and the judge here has found two facts which show that this case is not within *Brintons, Limited v. Turvey*, (1905) A. C. 230. First, he has found that it is not possible to give a day as the date of the alleged accident. The time of the accident is sufficiently given, he says, under the circumstances. I do not know what he means by that, but the first finding is that it is impossible to give a day as the date of the accident, and the next is that the workman died from the results of poisoning contracted whilst working on the cesspools, whether it is called ptomaine or toxin poisoning. This is analogous to saying that he died from the results of cold contracted some time or other during the last month by working in a factory. That is not the sort of specific finding which is required to support the conclusion that an accident within the meaning of the Act has happened.

KENNEDY, L. J. On the second point I am not prepared to differ from the judgments that have been pronounced, but in saying that I must express my own feeling of doubt on the point. In the case of *Broderick v. London County Council*, (1908) 2 K. B. 807, I entirely assented, and I still assent, to the reasoning which was fully and clearly expressed by the Master of the Rolls in his judgment, and in the course of which he cited what Mathew L. J. insisted on in *Steel v. Cammell, Laird & Co., Ltd.*, (1905) 2 K. B. 232, that is that where you have a man following a dangerous occupation, and you can not give a date, the case is not within the Act, except in regard to these particular classes of disease which are now scheduled. It is hardly a lawyer's question. Here the case is this. A man not employed in sewer work at all, but employed as caretaker and laborer, is asked to assist in opening up some cesspools; there are three or four dates given, all within about a week, during which he was employed in this work, and it seems to me that it is impossible to put that evidence exactly on the same basis as the findings of fact in the cases to which reference has been made, as, for instance, *Broderick v. London County Council*, *supra*, where the man was inhaling sewer gas in the course of his regular employment by

the London County Council in sewers. You can not say in such a case that there was an accident, because it may be the cumulative result of weeks or months, or years, of such work. Here you have a man set to do a particular job. He goes down to it, and the result is an illness, and it is found by the county court judge that it is due to the inhalation, or getting into his body—putting it in the most general form—of a toxin in the form of bacteria. According to the judgment of the House of Lords, if you can prove that on a particular day, though nobody saw it, a particular bacterium from the wool struck his eye, because his eye was afterward found to be diseased, that is an accident. It is not easy, I think, to draw a clear line of distinction between that and what might, I think, have been found here, on the medical evidence, that the death was due to toxin poisoning which got into his body on one or other of the particular occasions on which the deceased worked in the cesspools.

Appeal allowed.¹

¹ *Accord: Steel v. Cammell, Laird & Co.*, L. R. 1905, 2 K. B. 232, 7 W. C. C. 9, lead poisoning; *Broderick v. London County Council*, L. R. 1908, 2 K. B. 807, 1 B. W. C. C. 219, contracted by the constant and continued inhalation of sewer gas; *Marshall v. East Holywell Coal Co.*, *Gorley v. Backworth Colliery Co.*, 21 T. L. R. 494 (C. A. Eng. 1905), 7 W. C. C. 19, miners' diseases caused by continuous friction, *Martin v. Manchester Corp.*, 28 T. L. R. 344 (C. A. Eng., 1912), 5 B. W. C. C. 259; *Evans v. Dodd*, 5 B. W. C. C. 305 (C. A. Eng., 1912); *Sherwood v. Johnson*, 5 B. W. C. C. 686 (C. A. Eng., 1912); *Liondale Bleach &c. Works v. Riker*, 85 N. J. L. 426 (1914).

The Massachusetts Act omits the words "by accident" and only requires notice of the injury, in consequence it has been declared to include "occupational diseases" as well as all other diseases though of gradual growth due to continuous exposure to unsanitary work conditions, *Hurle's Case*, 217 Mass. 223 (1914); *Johnson's Case*, 217 Mass. 388 (1914).

The Michigan act while omitting the words "by accident" from its definition of compensable injuries, requires the claimant to give notice of "the accident." For this and other reasons the Supreme Court of Michigan held in *Adams v. Acme White Lead etc. Works*, 148 N. W. 485 (1914 Mich.), that gradual lead poisoning was not covered by the terms of that act.

So even a deterioration of the physical structure of the body due to the strain of continuous hard or even excessive labor is not the subject of compensation under either of the British acts, *Walker v. Hockney Bros.*, 2 B. W. C. C. 20 (C. A. Eng., 1909), paralysis due to the over-exertion involved in the constant propelling of a carrier tricycle; *Coe v. Fife Coal Co.*, 1909, Sess. Cases 393, 2 B. W. C. C. 8, gradual break-down of the heart due to long-continued overwork. Where, however, some sudden over-exertion causes a break-down of the brain or an organ previously weakened by over-exertion this is an injury by accident, *McInnes v. Dunsmuir & Jackson*, 45 Scot. L. R. 804 (1908, Sc. Ct. Sess.), 1 B. W. C. C. 226, but see *Kerr v. Ritchies*, 1913, Sess. Cases 613, 6 B. W. C. C. 419.

SECTION 2.

"Arising Out of and in the Course of the Employment."

(a) "In the course of employment."¹GANE *v.* NORTON HILL COLLIERY COMPANY.

Court of Appeal, England, 1909. L. R. 1909, 2 K. B. 539.

An appeal by the workman from an award of his Honor Judge Gwynne James at the County Court at Midsomer.

COZENS-HARDY, M. R. I hope I shall never be found departing from the fundamental rule that the learned County Court Judge is the tribunal to find the facts of a case. But if the learned Judge draws from the admitted facts a wrong conclusion in point of law—I care not whether you call it misdirecting himself or not—that is a decision which is open to review in this Court. Now what are the facts found by the learned Judge in the present case, and, as I say, not in dispute? The applicant was employed at the respondents' colliery, and went there every morning. Through some mishap to the machinery the applicant had to come up from the pit earlier than usual, and had to go home. Having come up, he went home by the route which he had adopted during the whole time of his employment, and he had been employed by the respondents for eighteen months. For the eighteen months during which he had been a workman at the colliery—with the single exception of Saturdays, when he had to go to the pay office—the applicant always went from the colliery through a door, down some steps, and across certain lines of railway upon which the colliery trucks are moved backward and forward, as the occasion may be. Not only did the applicant do that, but also all the colliers living in the same district as that in which the applicant lived. It is true that there were two other modes by which the colliers might have left the colliery premises and gone to their homes, one of which was by crossing a bridge, a little further round, and another of which was in a different direc-

¹ This phrase is used in all the Compensation Acts in force throughout the United States except that of the states of Washington and Wisconsin. The Washington Act (Sec. 5) provides that "every workman who shall be injured whether upon the premises or at the plant, or he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of the death of the workman, shall receive . . . compensation;" while the Wisconsin Act, Sec. 2394-3 (2), gives compensation "where, at the time of the accident, the employé is performing service growing out of and incidental to his employment" and further provides that "every employé going to or from his employment in the ordinary or usual way, while upon the premises of his employer shall be deemed to be performing service growing out of and incidental to his employment."

tion. But the learned County Court Judge finds in the clearest possible language that the way that the applicant went on the day of the accident was the usual one for him to go, the usual one for the other men to go who lived in the same direction, and the one and only way which he and they went except on Saturdays. He adds: "I am driven to the conclusion, that being so, that it was with the knowledge of the respondents that the man went that way, and the respondents never suggested to the men that they should not go that way." Having gone on this particular occasion through that door, down those steps, as he had done for eighteen months, there happened to be trucks on the railway lines, and the applicant with the other workmen who were coming away at the same time—two of whom, I understand, gave evidence—was passing between two of the trucks when there were some shunting operations, of which there was no warning, I presume, given, and the unfortunate man had the wheels of one truck come over his legs, and he has had to have both legs amputated. What was the duty of the applicant; what was really the implied term of his employment? That he should when his day's work was over, without loitering and with all reasonable speed,¹ leave the colliery premises by the accustomed and permitted route. That is what he did. It was in the course of that departure that the accident happened. I feel myself bound to say that in point of law this accident which happened in the immediate neighborhood of the pit's mouth, close to the screen on the colliery premises, was an accident which happened "in the course of" the applicant's employment—the course of his employment plainly not being limited at one end to the moment when he reaches the place where he is to do his work, or at the other end to the moment when he comes up from the pit's mouth. It must include a reasonable interval of time and of space during which the employment lasts. I do not think that I need repeat what I said in the "colliers' train case" (*Cremins v. Guest, Keen and Nettlefolds, Limited*, (1908) 1 K. B. 469; 1 B. W. C. C. 160), though I must not be taken to lend any color to the suggestion that a workman is entitled to the protection of the Act during the whole period necessary to get to his own home from the place where he is employed.²

¹ While a workman may not loiter unnecessarily upon his employer's premises, *Smith v. South Normanton Colliery Co., Ltd.*, (1903) 1 K. B. 204, 5 W. C. C. 14; *Benson v. Lancashire & Yorkshire Ry. Co.*, (1904) 1 K. B. 242, 6 W. C. C. 20, he is allowed a reasonable time to get to and from his work, and see *In re McCarthy*, note 3 *infra*. What is a reasonable time depends on the circumstance of the case. So if the workmen are obliged to come and go by trains which arrive and leave some little time before and after the work begins and ends, the workmen are not required to pass these intervals on the public highways, but are in the course of their employment while passing them upon their employer's premises, especially if their custom of so doing is known to their employer and he has provided for their accommodation, *Sharp v. Johnson & Co.*, (1905) 2 K. B. 139, 7 W. C. C. 28.

² See Lord Dunedin in *McNeice v. Singer Sewing Machine Co.*, 48 Sc. L. R. 15 (1910), "After he" (a workman leaving a factory) "has once got clear of the factory and is going to his home in another part of the town, he would not be injured in the course of the employment" and this is so

But in a case like the present it seems to me quite impossible as a matter of law to say on these admitted facts—the accident having happened where it did, and at the time it did—that it was not an accident which happened “in the course of” his employment. For these reasons I think that the learned County Court Judge—who himself expressed very great doubt as to the proper inference he ought to draw—did not draw the right inference. I think that our conclusion must be that this accident did arise “in the course of” the employment as well as “out of” it, and, therefore, that compensation ought to be awarded to the applicant. Unless the figures are agreed the case will have to go back to the learned County Court Judge.³

KENNEDY and FARWELL, L. JJ., delivered judgments to the same effect.

Appeal allowed.

if he is walking, and see *In re Anderson*, Bulletin Ind. Com. of Ohio, Vol. 1, No. 21, p. 90.

So there is no compensation due under the Act to a workman injured by strikers in the public streets while on his way home from work, and if the employer has agreed to compensate him, the compensation so promised must be recovered by an action on the contract, *Poulton v. Kelsall*, L. R. 1912, 2 K. B. 131, 5 B. W. C. C. 318.

Nor is the employer liable because the workman to reach his work must pass over the place where the injury occurs and in so doing would be a trespasser, except for the implied license to enter which he has as the workman of his employer, *Holness v. Mackay & Davis*, L. R. 1899, 2 Q. B. 319, 1 W. C. C. 13, where an employé of a contractor who was doing work on a railway line was injured at a crossing over which he had to pass to reach the point where the work was being done; but see *Sundine's Case*, 218 Mass. 1 (1914), 105 N. E. 433, where a workgirl was injured while on her way to lunch upon a flight of steps which, while affording the only access to her place of work, were not owned by or under the control or reparable by her employer, a contractor, or the person whose work the latter had contracted to do.

³ *Accord*: *Hoskins v. J. Lancaster*, 3 B. W. C. C. 476 (C. A. Eng. 1910), a workman going to work along a private road on his master's land was caught by a large iron gate thereon at a point 150 yards from his actual work place; *In re McCarthy*, Bulletin Ohio Ind. Com., Vol. 1, No. 7, p. 190 (1914), and *In re Schroeb, id.*, p. 132. The Scottish cases seem to take a narrow view and to require the workman to “come to some point where he enters upon the work he has to do.” *Anderson v. Fife Coal Co.*, 1910 Sess. Cases 8 (Sc. Ct. of Sess.), 3 B. W. C. C. 539 and see 25 H. L. R. 404, note 7.

A workman is in the course of his employment if he goes upon his employer's premises for the purpose of preparing himself for work, as by obtaining information when work will begin in the future or to get his pay, and this whether he is still in the master's employment or the employment has ceased, nothing remaining to be done except to receive his wages or to get his tools which he left when he quitted the employment. *Molloy v. South Wales Anthracite Colliery Co.*, 4 B. W. C. C. 65 (C. A. Eng., 1910); *Loury v. Scheffeld*, 24 T. L. R. 142 (C. A. Eng., 1907), 1 B. W. C. C. 1; *Riley v. Holland & Sons*, L. R. 1911, 1 K. B. 1029, 4 B. W. C. C. 155; *Nelson v. Belfast Corp.*, 42 Ir. L. T. R. 223 (C. A. Ir., 1908), 1 B. W. C. C. 158. *In re Phillips*, Bul. Ind. Com. of Ohio, Vol. 1, No. 7, p. 49 (1914), but not when he returns after being paid off to complain of a supposed error in the amount, *Phillips v. Williams*, 4 B. W. C. C. 143 (C. A. Eng., 1911).

BLOVELT v. SAWYER.

Court of Appeal, 1903. L. R. (1904), 1 K. B. 271.

Appeal from the refusal of the judge of the North Shields County Court to award compensation, under the Workmen's Compensation Act, 1897, to the applicant in respect of injuries caused to him by an accident.

COLLINS, M. R. I am of opinion that this appeal should be allowed. The applicant was a bricklayer, paid, as we are informed, by the hour, though that is not to be found in express terms in the judge's note. What happened was that in the dinner hour, in which it was open to him to go away from the premises, he stayed and sat down to have his dinner by a wall which had just been built. It appears from his evidence that there was no rule as to the workmen going or staying during the dinner hour, and that he was at liberty to do either. The learned judge of the county court has given judgment in a few words. He says: "I was of opinion that, as the applicant had sat down for the purpose of eating his dinner when the accident happened, the accident did not arise out of and in the course of his employment, and therefore dismissed the application." On the evidence as it stands on the judge's notes I should have felt no difficulty, because it would appear *prima facie* to indicate that the man was in his master's employment during the whole of each day, from the time at which he went to his work to the time when he came away, and equally during the dinner hour, if he stayed, as during any other part of the time. He would be there on the contract with his master during all those hours, either directly in order to do that for which he was employed or for some purpose ancillary thereto. That would embrace all his movements within the ambit of the factory, going or coming, or stopping there for any purpose ancillary to his work. But we are told that there were admissions made between the parties, which do not appear on the judge's note, that men in the position of the applicant were not paid by the day or week, but by the hour, and that the dinner hour was excluded from the computation of his wages, and was not a time during which he was earning pay. That creates a difficulty, or, at all events, requires consideration. It seems to me, however, that if the dinner hour can be brought in as part of the time which is given by the workman for some purpose ancillary to his work, such as feeding himself, which is, of course, essential to enable him to do his work, it would be taking too technical a view to say that the pause in the actual course of his work for the purpose of eating his dinner was a break in his employment from the time that he stopped work to the time at which he began again. It seems to me that, notwithstanding what is alleged as to the payment being for the hours in which the applicant was actually engaged in work and not for the time in which he took his meals, we must take a broader view, and treat him as continuing in the employment of the master by the con-

sent of the master, inasmuch as it is for the master's advantage that the workmen should have an opportunity to feed themselves. A workman should do his work all the better by taking his meal at that time, and if it is part of the contract between him and his master that he may do so upon the works instead of going away, that may be a matter of mutual convenience. A man might, for instance, live at a distance, and it might be desirable, from the master's point of view, that he should not tire himself by going to and fro for his food instead of reserving his strength for his work. It does not seem to me that, as a matter of law, it can be said that, when sitting down to his dinner, the applicant had ceased to be in his master's employment. From the mere facts that he was not paid for this particular time and that he was not engaged in the main purpose of his work it can not, as a matter of law, be said that he had ceased to be in the employment of his master. The accident to the applicant can, as it seems to me, be properly said to have arisen out of and in the course of his employment, and, that being so, the appeal must be allowed.

MATHEW, L. J. I am of the same opinion. The county court judge seems to have been under the impression that when this man sat down to eat his dinner on the premises he ceased to be in the employment of his master, whatever may have been the arrangement between them. It appears that the arrangement as to wages was that the man should be paid for as many hours as he was actually at work, but not for the dinner hour in the middle of the day. It also appears that he was not obliged to leave the place where he was working and obtain shelter and food elsewhere. That being the case, how can it be said that this accident did not occur in the course of his employment? The learned county court judge seems to have thought that the test whether the employment was continuing at the time when the accident happened was whether wages were paid for that time. It seems to me that under the circumstances of this case the wages paid to the applicant covered this time, although the dinner hour was not taken into account in computing the amount. I do not think it possible to arrive at any other conclusion than that the accident happened in the course of the man's employment. It could not reasonably be held that he had broken his contract of employment when he ceased to work in the dinner hour. I agree that the appeal must be allowed.

COZENS-HARDY, L. J. I agree. The learned judge has not found in very clear terms what were the precise conditions of the employment. I gather, however, from the admissions that there was a contract by which the applicant was to be paid at the rate of so much an hour for the time that he was actually at work, and that it was a term of the contract that the dinner hour might be spent either on or off the premises. If it had been part of the contract, as it is in some employment, that the dinner hour should be taken on the premises, there could not have been a doubt that an accident occurring during the dinner hour would have occurred in the course of the employment, because by the contract the workman would be

bound to be on the premises. In my view it can make no difference if the fact is that by the terms of the particular engagement the workman was to have the right, if so minded, to get his dinner on the employer's premises. I think it would be to place a narrow construction on the Act if we held that the accident to the applicant did not occur in the course of his employment. I agree that the appeal succeeds, and the case must go back to the county court.¹

Appeal allowed.

¹ *Accord: Morris v. Lambeth*, 22 T. L. R. 22 (C. A. Eng. 1905), 8 W. C. C. 1; and *In re Schatz Bulletin Ind. Com. of Ohio Vol. 1, No. 7*, p. 60. So compensation is due to a workman who is injured on the premises while getting a drink of water or waiting while no work is ready to be done, *Keenan v. Flemington Coal Co.*, 5 Fraser 164 (Sc. Ct. Sess. 1903); *Henderson v. Glasgow*, 2 Fraser 1127 (Sc. Ct. Sess. 1900); *Earnshaw v. Railway Co.*, 115 L. T. J. 89, 5 W. C. C. 28 (Halifax Co. Ct. 1903); *Terlecki v. Strauss*, 85 N. J. L. 454 (1914), mill girl, after she had stopped work and left her machine, was combing the wool out of her hair preparatory to going home, her hair got caught in another machine and she was injured; *Zabriskie v. Erie R. R.*, 85 N. J. L. 157 (1913), workman run over by train while crossing the tracks to reach the only water closet provided on his employer's premises; *Hartman v. Milwaukee Fuel Co.*, Report Wisc. Ind. Com. of July 20, 1914, p. 64. This is of course so where the employé is a sailor, domestic servant or other employés required to pass all their time on the employer's ship or premises. "I have no doubt that the leisure of a sailor on board a vessel is as much in the course of his employment as active work,"—Fletcher Moulton, L. J., in *Marshall v. S. S. Wild Rose*, L. R. 1909, 2 K. B. 46, p. 49.

As to the effect of a workman's choice of an unnecessarily dangerous place for eating his meals, etc., or path to or from his place of work, see *Brice v. Lloyd*, L. R. 1909, 2 K. B. 804, 2 B. W. C. C. 26; *Thompson v. Flemington Coal Co.*, 48 Sc. L. R. 740 (Ct. Sessions 1911).

But the master is not liable if the servant is injured outside the master's premises during the lunch hour, *McKrell v. Howard and Jones*, 2 B. W. C. C. 460 (London Co. Ct. 1909); *Gilbert v. S. S. Nizam*, L. R. 1910, 2 K. B. 555, 3 B. W. C. C. 455, or during a temporary cessation from his employment for the purpose of satisfying necessities of nature, even though the employer has not furnished facilities on his premises, *Cogdon v. Gas Co.*, 1 B. W. C. C. 156 (Sunderland Co. Ct. 1907). *Contra: In re Sundine*, note 1 to *Gane v. Norton Hill Co.*, ante, and see *Nelson v. Belfast Corp.*, 42 Ir. L. T. 223 (C. A. Ir. 1908), 1 B. W. C. C. 158, workman injured on public highway while on his way from his work place to the corporation offices where he had to go to get his pay. Compare *Martin v. Lovibond, etc.*, L. R. 1914, 2 K. B. 227, where compensation was awarded to a drayman, who stopped, while on his regular round of calls, at a public house to get a drink, leaving his dray on the opposite side of the street, while on his way back to the dray he was run over and killed.

In every case in which a workman, injured while coming or going to work or while engaged in doing something "ancillary" to his employment, has been given compensation, the injury has been in whole or in part one due to the nature or condition of the premises or vessel, or to some operation of the employer's business thereon,—in a word, because of some danger incident and peculiar to the place where he is required or entitled by virtue of his contract of employment to be for these purposes. See *Farwell, L. J.*, in *Gilbert v. S. S. Nizam* (1910), 2 K. B. 555, 558, 3 B. W. C. C. 455: "The man who is crushed by a falling wall on his employer's premises while he is eating his dinner recovers compensation because he is entitled to be on the spot by virtue of his contract of employment." "If he (he is speaking of a workman in a deep slate quarry) has to use some perilous means of access (or is required or permitted to satisfy his natural wants in a dangerous place),

GILMOUR *v.* DORMAN, LONG & CO., LTD.

Court of Appeal, England, 1911. 4 Butterworth's W. C. C. 279.

An appeal by the employers from an award of his Honor Judge Templer of the County Court at Middlesbrough.

The workman, Gilmour, was employed as a watchman at the employers' Britannia Steel Works. For many years he had been in the habit of going to his work by walking along a footpath which ran over some vacant land belonging to the employers, and then along the railway line of the North Eastern Railway. In March, 1909, as he was going to work by this route, he slipped on some ice, and broke his ankle. He received half wages till May 24, 1909, when he resumed work. He was dismissed in November, 1910, and thereupon applied for compensation. The Judge held that, as the man was on premises of his employer at the time, and was on his way to work, he was constructively in the employment at the time, and the accident accordingly arose in the course of the employment; he awarded compensation.

COZENS-HARDY, M. R. (after stating the facts, and the findings of the Judge). With great respect to the Judge, I am unable to accept his view. The facts are not in dispute. The inference to be drawn from them is a question of law. It seems to me that the circumstance that the property in the vacant land was vested in the employers is irrelevant. Gilmour was not employed on that part of their property. Moreover he had no right to go, and his employers could not confer upon him any right to go, along the North Eastern Railway line. Another route existed, by which he had ready access to his work. I can not regard the case as in any way different from the case where a man slips on the ice on a public road, a quarter of a mile from his employer's works. It has been repeatedly held that a man is not entitled to the protection of the Act when on his way from his home to the works. There may be some difficulty in ascertaining precisely where a man's employment begins. Generally speaking, the factory gate or yard indicates the boundary. Sometimes there may be a sort of excrescence, but I am not prepared to hold that an accident which occurred in a field some quarter of a mile distant, and separated from the premises where the man is to work by land over which he has no right of

the dangers which he runs in such use are to my mind incident to his employment just the same as those he runs while actually working. It is by reason of the employment that he becomes subject to those risks."—Fletcher Moulton, L. J., in *Moore v. Manchester Liners*, (1909) 1 K. B. 417, 2 W. C. C. 87, 89. In no case has recovery been allowed where the sole cause of the injury is the manner in which the servant is coming or going, eating, drinking, or resting,—as where a servant chokes himself while at dinner, O'Connor, J., in *Cogdon v. Sunderland Gas Co.*, 1 B. W. C. C. 156 (1907).

access, can be deemed to have arisen in the course of his employment. I think that the appeal must be allowed.¹

BUCKLEY and KENNEDY, L. JJ., agreed.

Appeal allowed.

KITCHENHAM v. THE OWNERS OF THE S. S.
"JOHANNESBURG"
LEACH v. OAKLEY, STREET & CO.

Court of Appeal, England, 1910. L. R. 1911, 2 K. B. 523.

An appeal by the employers from an award of His Honor Judge Howland Roberts, of the County Court at Brentford.

An appeal by the employers from an award of His Honor Judge Lumely Smith, of the City of London Court.

FLETCHER MOULTON, L. J. These two cases raise in a sharp and clear way the same issues as were dealt with in this Court and in the House of Lords in the case of *Moore v. Manchester Liners, Ltd.*, (1910) A. C. 498; 3 B. W. C. C. 527. In that case the applicant was a fireman on board a steamer belonging to the respondents. While it was lying at Brooklyn he went on shore for the purpose of making certain necessary purchases, and returned to the ship at night to sleep there, as was his duty. The vessel's deck was considerably higher than the wharf, and access was obtained by a ladder fastened to the ship. As he was mounting this ladder his foot slipped, and he fell between the ship and the wharf, and was drowned. Upon the special facts of the case I came to the conclusion that he went on shore with leave, and the majority in the House of Lords took the same view of the facts in this respect. The first and by far the most important issue in this case was whether the accident occurred "in the course of" the man's employment. The view that I held was that his going ashore with leave did not create a suspension in his employment, which was affirmed by a majority in the House of Lords. The other view was that, whether or not the going on shore was a breach of the contract of service, it created a suspension of the employment, and that that service only recommenced when the sailor had got on board the ship again. I consider it, therefore, to be settled that when a ship is in port, and a sailor goes on shore with leave, his employment is not interrupted thereby. The considerations on which this conclusion rests are dealt with at length in my judgment in the case.

The second issue was whether the accident arose "out of" his employment. In the same case this issue offered no difficulty to my

¹ *Accord: Williams v. Smith*, 108 L. T. 200 (C. A. Eng. 1913), 6 B. W. C. C. 102, where a workman was injured upon a path on his employer's land open to the public generally as well as to employes; and *Hills v. Blair*, 148 N. W. 243 (Mich. 1914), member of section crew run over while walking on his employer's tracks 950 feet from his place of work, it being possible for him to turn off into a public highway at a point close to such work place.

mind when once it was decided that the employment was continuous and was not interrupted by the visit to the shore. But although the decision of this, as a separate issue, presented no difficulties in that case, it is in its essence an issue depending on very different matters from those which decide whether the accident arises in the course of the employment. It is not dependent on whether the seaman is on board the vessel or not. A seaman would be perfectly entitled to occupy his hours of leisure in playing leapfrog or skylarking if he did not thereby break any rules. But an accident that occurs to him through his so doing might not be an accident arising out of his employment. Similarly, if a seaman went on shore in his hours of leisure with leave and got injured in the traffic, that would not be an accident arising out of his employment. By going on shore with leave the seaman does not interrupt the course of his employment, but any accident that occurs during the period of his being on shore is generally, if not necessarily, due to a danger to which he is exposed as a member of the public, and not as one of the crew of the ship, and therefore is one which does not "arise out of his employment." But if, whether in his hours of leisure or not, it becomes necessary for him, in fulfilment of his employment, to get on board his vessel, an accident occurring in his doing so is normally an accident arising out of his employment, because it is due to a danger incidental to his service in that ship. In the cases before us the accident occurred on the return of the seaman to the ship immediately prior to his actually getting on board. This is the critical moment when the dangers to which he is exposed change from being of the one class to being of the other class, and it will frequently be a difficult task to draw the line between the two. But I do not think it difficult to lay down the general principle by which our decisions ought to be guided. The return to the ship is in the course of his employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus, if the risk is one due to the means of access to the ship, as in *Moore v. Manchester Liners, Ltd.* (*supra*), the accident is rightly said to arise out of his employment; but if the accident is shown to arise from something not specifically connected with the ship it can not be said to arise out of his employment. I do not think that the dividing line is when he actually touches the ship or the special means of access thereto. For instance, if it was shown that when the sailor returned to the ship there was a dense fog, and that in trying to find the gangway, which I will suppose was not lighted, he fell into the water and was drowned, I think that the accident would arise out of his employment. But if all that is shown is that it occurred during his return to the ship, but while he was still on shore, and before he had taken any specific step toward getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment. In my opinion the facts of the two cases which are before us for decision place them respectively on the one and on the other side of this narrow dividing line.

(b) *Leach v. Oakley, Street and Co.*

In this case another vessel was lying between the *Portslade*, which was the vessel on which the seaman served, and the wharf, and access to the *Portslade* was by means of a gangway placed between it and the other ship. The deceased was returning to the ship after going on shore with leave, and he arrived at and passed on to this gangway when the accident occurred. It would seem that the gangway slipped and turned upside down. The man fell into the water and was drowned. This case is indistinguishable from *Moore v. Manchester Liners, Ltd. (supra)*. The applicant is entitled to succeed, and the appeal must be dismissed with costs.

(a) *Kitchenham v. The Owners of the Steamship "Johannesburg."*

In this case the access to the ship was by a gangway which led from the wharf to the ship. It was sufficiently lit by a hanging lamp on the davits and a light on the quay at the shore end, and it was provided with guide ropes. The evidence shows that the sailor on returning to the ship, after being absent with leave, came upon the wharf and walked toward the ship's gangway. It was not shown that he ever reached that gangway, and from the evidence of the ship's watchman, to the effect that he did not hear any one on the gangway, I should conclude that he never did reach it. A splash was heard a little abaft the inboard end of the gangway, and there was a cry from some person unknown of "Man overboard." This is all the material evidence. In my opinion this is not sufficient to negative the possibility that the accident was due to an accidental slip on the wharf or to the sailor having gone to the edge of the wharf for his own purposes (perhaps to look over in order to see the state of the tide) and fallen over. It is not the duty of the Court to speculate on such matters. It is for the applicant to prove that the accident arose "out of" the employment, and if the evidence is not sufficient to establish this the claim fails. I am of opinion that the evidence in this case falls short of what is necessary, and though one may think it possible, and even probable, that he was going on to the gangway when the accident occurred, this is not established with that reasonable certainty which the Court requires from a plaintiff in the proof of his case. I am, therefore, of opinion that this appeal must be allowed with costs.

FARWELL, L. J., read the following Judgment:—

(b) *Leach v. Oakley, Street and Co.*

The County Court Judge has decided this case on the ground that it is indistinguishable from *Moore v. Manchester Liners (supra)*.

It becomes necessary, therefore, to consider exactly what that case did decide. The facts there were that the sailor had gone ashore with leave, as the House of Lords determined, and in order to get on board his ship on his return had to climb up a ladder on to the deck. This was an ordinary open ladder, and was attached at the top to the ship in such a way as to allow play for rise and fall of the ship on the tide. The lower end rested on the quay.

The sailor fell off this ladder and was drowned. The majority in this Court held that it was immaterial whether he had gone ashore with or without leave, for the accident happened before he got on board, and although he was very near the vessel and on his way back, the result must be the same as if the accident had happened while he was on the road, or on the quay itself, (1909) 1 K. B. 417; 2 B. W. C. C. 87. In effect, the Court held that the ladder was part of the quay, not part of the ship, or, to use another phrase, that the ladder was not within the sphere of the man's duties. It appears to me that the question dealt with by the House of Lords was whether the man returned to his employment or not. The first question in all cases of this sort is, What is the workman's employment? It may be continuous, as that of a sailor on a voyage, or a domestic servant, in either of which cases, unless and until the continuity is broken or suspended, any accident necessarily arises "in the course of the employment," or it may be discontinued, in which case the nature of the express employment and the incidents that are reasonably necessary or proper for the due performance thereof have to be taken into consideration. This consideration also arises when a continuous employment is temporarily discontinued either with or without leave. The employment of a miner whose duty is to get coal is not confined to his work with the pick, but includes the reasonable and proper use of all matters incidental to the due discharge of his duty, *e. g.* the use in a reasonable way of means of access over the employer's premises for going and returning, visiting the office for his pay or going to a proper place on the premises to eat his dinner; he is authorized and entitled, and therefore employed to do all these matters, but when he has once left the ambit of such employment, *e. g.* by entering on the high-road (unless of course he has been sent by his employer on some business of the employer), his employment ceases and nothing that happens to him is "in the course of his employment," so in the case of a continuous employment which is discontinued, the same question arises as to the point where the employment ceased, and where it is taken up again. The sailor who goes on shore on a spree, whether with or without leave, while away from the ship, is out for his own amusement, and is not in the employment of his master; his master may allow him to leave his work to go for a spree, but he can not be said to employ him to go for a spree, and when the sailor returns, the question arises: at what point does he reach the ambit of his employment? It is immaterial whether he goes with leave or without; it is not a question of misconduct at all; it is whether (to use the Lord Chancellor's phrase in the *Wild Rose Case*, (1910) A. C. at p. 532), he was there in the course of duty or in the course of returning to it.

(a) *Kitchenham v. The Owners of the Steamship "Johannesburg."*

To apply this to the case of *Kitchenham v. S. S. "Johannesburg"* (*Owners of*), the man was not in the course of his employment when he went ashore to send a telegram to his wife: he was on

his own private business: if he had reached the gangway and had fallen off it, he would have returned to the ambit of his employment within the Manchester Liner's Case; but he had not, and so, for this purpose it is immaterial whether he was one yard or one mile from the gangway when he fell. The case is distinguishable from *Moore v. Manchester Liners*, and this appeal must be allowed with costs.

COZENS-HARDY, M. R., expressed concurrence with the judgments delivered.

Appeal allowed in (a).

Appeal dismissed in (b).¹

DONOVAN'S CASE.

Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 76.

SHELDON, J. The contest here is between Donovan, an employé of one McGeevey, and an insurance company which had insured McGeevey. The point in dispute is whether Donovan's injury arose out of and in the course of his employment. This must be decided upon the facts found by the Industrial Accident Board in its review of the report of the committee of arbitration.

Donovan was employed by McGeevey in cleaning out catch basins at a place about two miles from his home. It had been and was his custom, in common with other employés and with the knowledge and consent of his employer, to ride to and from the vicinity of the catch basins in a wagon furnished by his employer, the wagon meeting the employés on the street and the employer being notified if any of the employés failed to report for work at the beginning of the day. The wagon was at the service of the employés at the end of the day, and they might ride in it back to the employer's barn if they wished. Donovan was injured while so riding in this wagon at the end of his day's work, and the board has found that his transportation on the wagon was "incidental to his employment," and "therefore" arose "out of and in the course of said employment." The language of this last finding is a little obscure; but we treat it, as both counsel and also the Superior Court have treated it, as being an inference that Donovan's injury arose out of and in the course of his employment, drawn from the other facts stated, including the

¹ Where a part of the dock, such as a ladder fixed in its wall is "specifically appropriated to the access," to a particular ship and that ship only, a sailor injured thereon while on his way from the ship to the shore, after his day's work was over, was held entitled to compensation in *Webber v. Wansbrough*, 30 T. L. R. 615 (House of Lords 1914), *aliter*, where the injury occurs on a "dolphin" or float, which being a large structure was a means of access to the quay from other vessels as well as that on which the injured sailor was employed, *Cook v. S. S. Montreal*, 29 T. L. R. 233 (C. A. Eng. 1913).

As to when a sailor or domestic or club servant temporarily quits his employment and when he returns to it, see 25 H. L. R. 407 to 411, where the cases down to 1911 are collected and discussed.

fact that the transportation was "incidental to his employment." The question to be decided is therefore whether this inference could be drawn from those facts; for the facts themselves now can not be inquired into. St. 1912, c. 571, § 14.

There have been several decisions in England as to when and how far an employé can be said to have been in the employ of his master, while traveling to and from his work in a vehicle or means of conveyance provided by the latter, and how far injuries received in such a conveyance can be said to have arisen out of and in the course of the employment. Many of these cases have been cited and discussed by Professor Bohlen in 25 Harvard Law Review, *et seq.* From his discussion and the cases referred to by him, and from the later decisions of the English courts, the rule has been established, as we consider in accordance with sound reason, that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employés, and is one which the employés are required, or as a matter of right are permitted, to use by virtue of that contract. See *Davies v. Rhymney Iron Co.*, 16 T. L. R. 329; *Holmes v. Great Northern Railway*, (1900) 2 Q. B. 409; *Whitbread v. Arnold*, 99 L. T. 103; *Cremins v. Guest, Keen & Nettlefolds*, (1908) 1 K. B. 469; *Gane v. Norton Hill Colliery Co.*, (1909) 2 K. B. 539; *Hoskins v. J. Lancaster*, 3 B. W. C. C. 476; *Parker v. Pout*, 105 L. T. 493; *Walters v. Staveley Coal & Iron Co.*, 105 L. T. 119, and 4 B. W. C. C. 89 and 303; *Greene v. Shaw*, (1912) 2 Ir. 430, and 5 B. W. C. C. 530; *Mole v. Wadworth*, 6 B. W. C. C. 128; *Edwards v. Wingham Agricultural Implements Co.*, (1913) 3 K. B. 596, and 6 B. W. C. C. 511; *Walton v. Tredegar Iron & Coal Co.*, 6 B. W. C. C. 592.

The finding of the Industrial Accident Board that Donovan's transportation was "incidental to his employment" fairly means, in the connection in which it was used, that it was one of the incidents of his employment, that it was an accessory, collateral or subsidiary part of contract of employment, something added to the principal part of that contract as a minor, but none the less a real feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms. Especially is this so where none of the provisions of the contract has been shown by either party, but everything is left to be inferred from their conduct. That was the reasoning of this court in such cases as *Gilshannon v. Stony Brook Railroad*, 10 Cush. 228, 231; *McGuirk v. Shattuck*, 160 Mass. 45, 47; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 98; *Kilduff v. Boston Elevated Railway*, 195 Mass. 307; and *Feneff v. Boston & Maine Railroad*, 196 Mass. 575, 577.

Accordingly we are of the opinion that the Industrial Accident

Board had the right to draw the inference that Donovan's injury arose out of and in consequence of his employment.

Under our own decisions, Donovan at the time of his injury was in the employ of McGeevey and was a fellow servant with the driver of the wagon. *O'Brien v. Boston & Albany Railroad*, 138 Mass. 387. See also the cases last above cited. It is not easy to suppose that the Legislature intended that one who was under the disabilities of a servant should be excluded arbitrarily from the benefits which it undertook to give to all employés. The provisions of the act are to be construed broadly rather than narrowly. *Coakley's Case*, 216 Mass. 71, 73.

The decree of the Superior Court must be affirmed; and it is
So ordered.¹

REED v. GREAT WESTERN RAILWAY COMPANY.

House of Lords, 1908. 99 *Law Times* 781.

THE LORD CHANCELLOR (LOREBURN). My Lords: In this case one Reed, an engine-driver in charge of his engine, got down from it while it was at rest and crossed a siding to receive from a friend a book unconnected with his duties. On returning he was knocked down by a waggon then being shunted and killed. The only question in dispute was whether or not the accident which killed him was one "arising out of and in the course of his employment." I can not think that it was. I agree that labour is often intermittent. If a man is in the place of his employment and during its hours uses such intervals otherwise than in working, and while doing so is injured by one of the dangers to which the employment exposes him, that may be an accident within the statute. He may be in such case required to be in attendance and in that respect engaged on his duty,

¹*Accord: Richards v. Morris*, 110 L. T. 496 (C. A. Eng. 1914), *aliter*, where a farm laborer swims a stream between two farms to save himself the trouble of going by a bridge, the boat provided not being at the time available, *Guilfoyle v. Fennessy*, 47 Ir. L. T. 19 (C. A. Ir. 1912), 6 B. W. C. C. 453.

Compare *Parker v. Pont*, 105 L. T. 493 (C. A. Eng. 1911), 5 B. W. C. C. 45, where the employé was invited by a fellow-employé to ride in a vehicle driven by the latter but owned by the employer; and *Crow v. Los Angeles Ry. Co.*, Decision of Ind. Acc. Com. of California, Vol. 1, No. 21, p. 42 (1914), where a motorman was injured while riding to his place of work on a car of his employer's company, which he was not required to ride upon, though permitted to do so free of charge.

As to whether the workman puts himself out of the course of his employment by taking unnecessary risks while being carried to or from his work, compare *Watkins v. Guest, Keen & Nettlefolds*, 106 L. T. 818 (C. A. Eng. 1912), 5 B. W. C. C. 307, where compensation was awarded to a workman who, in his hurry to alight, contrary to orders, stood on the foot-board of the car, whence he was pushed off some sixty yards from his destination, with *Price v. Tredegar Iron etc. Co.*, 30 T. L. R. 583 (C. A. Eng. 1914), where compensation was denied a workman, who in his hurry to get home, jumped from the train before it reached the stopping place.

though not actually doing work. But here this man was where he was not entitled to be, and was not working, but pleasing himself. It is not that he thereby violated a rule, but that the accident did not arise out of or take place in the course of the employment at all. It took place while for the moment he quitted his employment. No doubt allowance must be made for the habits of business, and the Act must be applied reasonably; but in this case I can see no ground for allowing compensation.

LORD ASHBOURNE concurred.

LORD MACNAGHTEN. My Lords: I am of the same opinion. I think that the judgment of the Court of Appeal was right, for the reasons given by the Master of the Rolls. I agree with the Master of the Rolls in thinking that in all these cases it is incumbent upon the claimant to make out that the accident in respect of which compensation is claimed arose out of and in the course of the injured man's employment, not upon the employer to prove the contrary. But here the evidence shows that it was for a purpose of his own, and not in the execution of his duty or in the interest of his employers, that the injured man exposed himself to the risk which caused his death. He had been warned against doing the very thing which he ventured to do. He was, of course, wrong in disregarding the injunctions of his employers. But it is not on the ground of misconduct that his dependents are now without remedy. At the time when the accident happened the man was about his own business, not about the business of his employers. For the moment he had put himself outside the area of protection which the Legislature has carefully marked out. The case, in my opinion, is not within the scope of the enactment at all. I think that the appeal must be dismissed with costs.

THE LORD CHANCELLOR. My Lords: Lord James of Hereford, who heard the arguments, but is not able to be present to-day, desires me to say that he concurs in the motion which has been made.

Judgment appealed from affirmed, and appeal dismissed with costs.¹

¹ Accord: *Smith v. Lancashire & Yorkshire Ry.*, (1899) 1 Q. B. 141, 1 W. C. C. 1, in which a railway porter got on the foot-board of a moving train to speak to a friend and was there injured; *Williams v. Wigan Coal and Iron Co.*, 3 B. W. C. C. 65 (C. A. 1909), engine driver boarding slowly moving engine to give another driver wages paid by mistake to the claimant; *Hendry v. Caledonian R. Co.*, (1907) Scot. Sess. Cas. 732, 44 Scot. L. Rep. 584, fish porter going over railroad tracks to inquire how many fish trucks were expected; *Callaghan v. Maxwell*, 2 Fraser 420 (Scot. Ct. Sess. 1900), girl leaving her place to speak to a fellow workgirl, she had been forbidden to leave and the danger of so doing had been pointed out to her; *Warren v. Hedley Collieries*, 6 B. W. C. C. (C. A. Eng. 1913), mine roof fell on miner, while on his way back from asking a fellow miner the time; and see the case of *Curtis v. Talbot*, 5 B. W. C. C. 41 (C. A. 1911), surgeon volunteering as subject of scientific experiment; and *In re Procknau*, and *In re Mitchell*, Bulletin Ind. Com. of Ohio, Vol. 1, No. 7, pp. 66 and 56.

LOSH v. EVANS & COMPANY.

Court of Appeal, England, 1902. 19 Times Law Reports 142.

COLLINS, M. R. This is an appeal from the decision of the County Court Judge that the applicant was not entitled to compensation, on the ground that the accident did not arise out of and in the course of her employment. The applicant was employed in a colliery, and her duty was to pick dirt out of coal passing along a band which was actuated by machinery. The man in charge of the engine was temporarily absent, and, the engine having been stopped, and a signal having been given to start it again, the applicant took upon herself to attempt to start it, and in doing so she was caught in the machinery and injured. The question was, whether under those circumstances her employers could be held liable to pay her compensation. In his opinion the question whether the accident arose out of and in the course of the applicant's employment was purely a question of fact. One principle which had been established beyond doubt with regard to the Workmen's Compensation Act was that, where the County Court Judge decided a matter of fact on evidence which was capable of supporting his finding, then, unless this involved a misdirection on a matter of law, his decision could not be questioned in this Court. The County Court Judge in this case had, on the invitation of the Court, given his reasons for his decision. The County Court Judge found as a fact that it was no part of the applicant's duty to touch the engine. It seemed to be clear that an employer was at liberty to define the sphere of duty of his workmen, and to divide the labor of his workmen into unintelligent labor and skilled labor.¹ Here the applicant's own evidence did not furnish any suggestion that her sphere of duty extended beyond the simple work of picking dirt out of the coal. The case of *Lowe v. Pearson*,² was an authority to show that a workman employed in one sphere of work could not make his master liable for injuries accidentally sustained by him while acting in another sphere. The question whether and how far one sphere was marked off from another was a question of fact. In his opinion there was evidence justifying the County Court Judge in finding as he had done, and his decision must be upheld.³

¹ Compare the language of the same justice in *Whitehead v. Reeder*, L. R. 1901, 2 K. B. 48, 3 W. C. C. 40. "It is necessary to see exactly what is the sphere of the workman's employment, and, in my judgment, it is and must be competent for a master to define and limit what the sphere of employment is."

² L. R. 1899, 1 Q. B. 261, 1 W. C. C. 5, a boy employed in a pottery to make balls of clay and hand them to a woman at work on a machine, though forbidden to touch the machinery, attempted during the woman's absence to clean the machine.

³ Accord: *Edwards v. International Coal Co.*, 5 W. C. C. 21 (C. A. Eng. 1899); compare *Whitehead v. Reeder*, 1901, 2 K. B. 48, 3 W. C. C. 40; *Goslan v. Gillies*, 1907, Sess. Cases 68 (Sc. Ct. Sess.); *Menzies v. McQuibban*, 2 Fraser 732, (Sc. Ct. Sess. 1900), and *Wendt v. Ind. Ins. Co.*, 141 Pac. 311 (Wash.

ROMER, L. J., agreed with this judgment.

MATHEW, L. J., said he regretted that he could not concur with the judgment of the other members of the Court. The County Court Judge in the reasons which he gave for his decision, said that it was no part of the duty of the applicant to touch or interfere with the engine. But after reading all the evidence in the case, he could not see that there was any evidence of the existence of any duty on the part of the applicant not to stop or start the engine. She was not told in express terms, at the time when she was engaged, that she was expected not to go to the engine to stop it or to start it. It was admitted that she never received any precise directions on the matter. The respondents had the means of knowing what ordinarily went on when the girls were at work, and the evidence showed that it was the usual practice, when Dixon was away, for the girls to obey the signals, and stop or start the engine.⁴ In his opinion there was no evidence sufficient to justify the findings of the County Court Judge, and therefore he thought that the appeal ought to be allowed.

LONDON AND EDINBURGH SHIPPING CO. *v.* BROWN.

Court of Session, Scotland, 1905. 7 Sess. Cases (5th Series) 488.

A steamship was moored to a quay in a dock discharging her cargo under a stevedore, who had contracted with her owners to unload her. The laborers in the employment of the stevedore were each appointed to work in connection with a particular hold of the vessel, either on board her or on the quay. Peter Brown, who was employed on the quay to discharge cargo from the afterhold, and who did not require in the performance of his duty to go on board the vessel, on being informed that one of his fellow-workmen employed in the forehold was lying there in an unconscious condition

1914), and see cases cited in notes to *Plumb v. Cobden Flour Mills Co.*, *post*, p. 54, and 25 Harv. L. R. 413-416.

So a servant who, contrary to the express orders of his employer, takes the place and does the work of another, can not recover compensation for injuries received while so engaged, *Whelan v. Moore*, 43 Ir. L. T. 205 (C. A. Ir. 1909), 2 B. W. C. C. 114, *aliter*, where, to the knowledge of the master or his representative, it is the custom for such workmen to interchange and no objection has been made, *Cambrook v. George*, 5 W. C. C. 26, 114 L. T. J. 550, and this though the workmen interchanging duties were employed by different masters, *Hennaberry v. Doyle*, 46 Ir. L. T. 70 (C. A. Ir., 1911), 5 B. W. C. C. 580. As to the right of an inferior workman to go outside his appointed sphere, at the command of a superior, even in violation of general orders or prohibition, see *Brown v. Scott*, 1 W. C. C. 11 (C. A. Eng., 1899); *Geary v. Ginsler & Co.*, 6 B. W. C. C. 72 (C. A. Eng., 1913), and the very suggestive opinion of Parry, J., in *Statham v. Galloways, Ltd.*, 109 L. T. J. 133 (Manchester County Court, 1900), 2 W. C. C. 149.

⁴As to the effect of such a custom to disregard general rules, etc., compare *Richardson v. Denton Colliery Co.*, 6 B. W. C. C. 629 (C. A. Eng., 1913), with *Barnes v. Colliery Co.*, *post*, p. 59, and see *McKee v. Great Northern R. Co.*, 42 Ir. L. T. 132 (C. A. Ir., 1908), 1 B. W. C. C. 165.

owing to inhaling noxious gas, offered to attempt a rescue, and after a handkerchief had been tied around his mouth, was lowered into the forehold, where both he and the man he had attempted to rescue were suffocated by carbonic acid gas. Brown acted without instructions from his employer—the stevedore—who had gone for rescue appliances. Brown's mother brought a claim for compensation under the Workmen's Compensation Act, 1897, against the steamship owners as the undertakers in the sense of the Act.

The Sheriff-Substitute found that the accident arose out of and in the course of the said Peter Brown's employment.

LORD JUSTICE-CLERK. It appears to me that there can be no doubt that the deceased workman was, at the time when working immediately before the accident, employed on, in, or about a factory, the work which was being done having been the unloading of a ship and the placing of her cargo upon the quay alongside. Therefore the only real question in the case is whether it can be held he was in the course of his employment at the time when the accident to him occurred which caused his death. The circumstances are, that while at the side of the vessel he was suddenly informed that a fellow-workman was unconscious in the forehold, that he at once tied a handkerchief over his mouth, and got himself lowered to try to rescue the other man, and was himself suffocated.

Is he to be held, in these circumstances, to have acted in his employment? I think it must be fairly held that that question may be answered as it was answered in the Court below. I can not doubt that, in a sudden emergency where there is danger, a workman does not go out of his employment if he endeavors to prevent the danger from taking effect. For example, if, in a yard where a man is working, a horse suddenly runs off, and there is danger to others, I would hold that, if the man did his best to stop the horse, and met with an injury, he suffered that injury in the course of his employment. It would be a right thing to do, in the interest of the safety of those in the yard, and, therefore, in the interest of his master. The same would apply to the endeavor to sprag a runaway wagon, which might cause loss of life. No doubt this case is somewhat unusual, and the endeavor was made to liken it to the case of persons arriving on the scene of a disaster, such as a coal pit explosion, and deliberately volunteering to join a rescue party, and who, therefore, could be held not to be acting as employes, but solely as individuals. I can conceive such a case, where it would be very difficult to make the Act apply; but, in my view, any such case is distinguishable from the present one. Here the deceased was at the work that was going on. Had one of the men who was with him, engaged in work on the quay, come suddenly into danger, and he had instantly endeavored to save him, I could have no hesitation in saying that his doing so was an act in the course of his employment. I do not feel that his case falls into a different category because the man he tried to save was engaged at a different department of the same work in the factory. My opinion is that there is no sufficient ground disclosed in the statement of facts to require that we should

hold that the Sheriff pronounced a wrong decision in law in finding liability under the Act, and that the questions in the case should be answered in the affirmative.

LORD YOUNG. I concur.

LORD KYLLACHY. (Dissenting on the ground that the deceased did not lose his life by what can properly be called an accident.) I confess I have some doubt whether it can be said to have arisen out of his employment—I mean out of his employment at the particular time and place. I rather think that upon the facts stated it is difficult to affirm that what happened would not equally have happened although, the deceased being at the time where he was, had been there in some other employment, or in no employment at all.¹

¹ *Accord: Mathews v. Bedworth*, 106 L. T. J. 485 (Nuneaton Co. Ct., 1899), 1 W. C. C. 124, and *Yates v. South Kirby & Co. Colliery Co.*, L. R. 1910, 2 K. B. 538, 3 B. W. C. C. 418, a collier, while assisting in the removal of a shockingly injured fellow collier, received a nervous shock so severe as to cause neurasthenia.

So a servant may do acts entirely different from the work assigned him, even such as he is forbidden to do under normal conditions, if they are necessary to preserve his master's property from destruction, *Rees v. Thomas*, L. R. 1899, 1 Q. B. 1015, 1 W. C. C. 9, a mine boy held to be within the course of his employment while attempting to stop a runaway horse, though his employment had nothing to do with horses and he had got on the truck which the runaway horse was drawing contrary to orders and to steal a ride, (see also, *Hapciman v. Poole*, 25 T. L. R. 155, 2 B. W. C. C. 48, dependents of an employé of a lion-tamer, whose duty did not require him to come in contact with the lions, held entitled to compensation for his death while attempting to drive escaped lions back to their cage) or even if he honestly but mistakenly believes that they are so necessary, though his master's property is not in fact in any peril, *Harrison v. Whitaker Bros.*, 16 T. L. R. 108, 2 W. C. C. 12 (C. A., 1900), a boy employed to grease the wheels of trucks used upon his employer's private railway, while waiting for trucks to grease, went to warm himself at a fire near to the lever of a switch. He saw a train approaching and, thinking the switch closed, pulled the lever to open it, and in so doing was injured. In fact the switch operated automatically and the engine would have opened it. It was held that the boy's story being believed, there was sufficient evidence to justify the County Court in holding that the injury arose out of and in the course of the boy's employment. If, however, the servant or other person imperilled be not entitled to compensation if injured, the rescue has no tendency to protect the master's interest, and the servant's injury, received in attempting it, does not arise in the course of the employment, *Mullen v. Stewart*, (1908) Scot. Sess. Cas. 91, 1 B. W. C. C. 204, and see *In re Armstead*, opinions of the Solicitor of the Department of Commerce and Labor 240, foreman injured in attempting to save the life of a workman imperilled in a fight, and *In re Verkamp*, Bulletin of the Ind. Com. of Ohio, Vol. 1, No. 7, p. 123 (1914), messenger injured while giving assistance to a horse, not owned by his employer, which had been overcome by the heat. In *Powell v. Lanarkshire Steel Co.*, 6 Fraser 103 (Scot. Ct. Sess., 1904), it was held that a servant injured while endeavoring to save property which had been imperilled by his own acts done outside his sphere of employment and in disobedience of orders, was not entitled to compensation. But see *Hapelman v. Poole*, 25 T. L. R. 155, 2 B. W. C. C. 48. So a servant, doing another servant's work to oblige him, is not within the course of his employment, *McAllan v. Perthshire County Council*, 8 Fraser 783 (Scot. Ct. Sess., 1906).

HARDING v. THE BRYNDDU COLLIERY COMPANY LTD.

Court of Appeal, England, 1911. L. R. 1911, 2 K. B. Div. 747.

Appeal against the award of the judge of the Bridgend County Court upon a claim for compensation under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether the wilful disobedience of an order not to enter a dangerous working so far took that place out of the sphere of the workmen's employment that the accident could be held not to have arisen "out of" the employment.

The deceased man Harding was employed as a collier by the defendant collier company.

In November last, Harding was employed with others hewing coal on a somewhat steep slope which was worked upwards; a good deal of gas had collected in this working (which was called the "top hole"); in order to get rid of this gas and thus enable the coal to be safely worked, Harding and another man named Henson were taken away from their ordinary work and employed at so much an hour to work in a "bogey"—a passage cut through the seam above the "top hole"—in order to drill a hole from above into the "top hole" to let out the accumulation of gas.

The entrance to the "top hole" from below had been blocked with cross boards, to show that it was unsafe for any one to enter, in accordance with the Colliery Special Rules made pursuant to the Coal Mines Regulation Act, 1887, by which all colliers and others were expressly forbidden to enter any working so blocked without leave or order of the fireman or other superior officer. Harding and his mate after some days' labour had worked the drill about five feet into the ground twice, without getting into the "top hole," and he thereupon asked a foreman or overlooker if he might go into the "top hole," to ascertain from the blows on the drill above, and by tapping on the roof from below, whether the drill was being driven in the right direction. The fireman told Harding he was not to go as the "top hole" was unsafe.

Notwithstanding this order, Harding went round and entered the "top hole" from below; he was heard by his mate above tapping the roof with a mandril handle, and then all sounds ceased; on his mate going round, Harding was discovered some six feet up the working suffocated by the gas.

On a claim for compensation by Harding's dependents, the County Court Judge made an award in their favour for £300, being of opinion that though Harding had been guilty of serious and wilful misconduct in going into the "top hole" his dependents were nevertheless entitled to an award under the Compensation Act.

The employers appealed.

COZENS-HARDY, M. R. This appeal raises a difficult question. The applicants are the dependents of a deceased collier and the question is whether a fatal accident arose "out of and in the course

of" his employment. The material facts may be shortly stated. (Having stated the facts and the finding of the county court judge, his Lordship continued.) I desire to repeat what I said in the recent case of *Weighill v. South Hetton Coal Co., Ltd.*,¹ 757: Serious and wilful misconduct within the sphere of the employment does not prevent his dependents from claiming compensation, but wilful misconduct outside the sphere of his employment does not bring the accident within the sphere of the employment. The real difficulty in this case is, was the sphere of employment so limited as defined as to exclude the "top hole," or was this man's entrance into the "top hole" merely an act honestly done in furtherance of the object which he was instructed to effect, namely, to tap the gas by means of a drill hole? In my opinion the latter is the true view. This case in no way resembles the case, *Weighill v. South Hetton Coal Ltd., supra*, which was recently before us, where a collier who was employed to hew coal in a particular part of the mine deliberately and for his own advantage went to a different part of the mine where the coal was softer. In that case we held that by so doing he had departed from the course of his employment. So in the present case if Harding had entered the "top hole" with the object of working coal there, and not with the view of assisting the drilling operation, I think the employers would not be liable. In my opinion he was engaged in the drilling operation, although he was guilty of serious and wilful misconduct in entering the "top hole."

I have had the opportunity of considering the very recent case of *Conway v. Pumpherson Oil Co., Ltd.*,² a case which is really indistinguishable from the present case, and I have the satisfaction of finding that the view which I have taken is supported by the high authority of the judges of the First Division. In my opinion the appeal fails and must be dismissed with costs.

BUCKLEY, L. J. It is a matter of regret, but scarcely of surprise, that in such a case as this opinions should differ. I am of a different opinion from the Master of the Rolls.

From the judgment of the learned county court judge I read this passage: "The act though it was a disobedience of the rule and serious and wilful misconduct was honestly done for the sole purpose of expediting his work of getting coal which was the main purpose of his employment and was therefore within the scope or sphere of his employment." In that, to my mind, lies the error of this judgment. The purpose of this man's employment at the time of the injury was to drill a certain hole. The "scope or sphere of

¹ Cited in a note to the principal case, L. R. 1911, 2 K. B. 747, 4 B. W. C. C. 269, wherein compensation was denied the dependents of a miner who being paid by the amount of coal mined, instead of working at the "face" directed by his employer, worked at another place where the coal was softer and more easily mined, though much more dangerous and expressly forbidden, accord: *Parker v. Hambrook*, 5 B. W. C. C. 608 (C. A. Eng., 1912), workman in quarry killed under very similar circumstances.

² 1911, Sess. Cases 660 (Sc. Ct. of Sess.), 48 Sc. L. R. 632, 4 B. W. C. C. 392, compensation allowed to dependents of a miner killed while fetching a pick from a part of the workings which he had been forbidden to enter.

his employment," if I am to use the learned judge's expression, was not to do that act in any place whatsoever. It was to do it at one place to the exclusion of another place. To explain what I mean I will give an illustration. Suppose that the employer is a quarry owner and employs a quarryman to quarry stone in quarry A. The man goes to quarry B, and quarries there and is injured. To my mind he is outside the Act of Parliament altogether. He was not employed to go there at all. He had no business there. His business was to go to A and quarry in A. I may add (though the reason to my mind makes no difference) that it may be that the owner knew that quarry B was dangerous; that stone was liable to fall there; and that he had expressly closed it because it was dangerous. When the man went to B he could not say he went there in the course of his employment at all.

To take another illustration, suppose a man is a collier and is employed to hew coal in the top seam; and that there is a lower seam and he is told not to go there. I will suppose again (though it adds nothing to my mind to it) that the ventilation of the lower seam is imperfect, and that there is gas there which makes it dangerous. Whether with reason or without reason his employment is to hew in the top seam and not in the lower seam. Under those circumstances if he goes to the lower seam and hews coal there, to my mind he is outside the sphere of his employment altogether, and if he sustains injury he is not within the Act of Parliament.

It seems to me that the Lord President in the Scotch case of *Conway v. Pumpherston Oil Co., Ltd.*, laid down with perfect accuracy (if I may say so respectfully) two ways in which a servant may be outside the sphere or scope of his employment. The one is the case where he exceeds the limits imposed by the nature of his work. The instance given by the Lord President is that where the footman takes the reins and drives the horses. He is not within his employment for he is not employed for that purpose. The other is where a man goes into a territory with which he has nothing to do, of which I have given the instance where the man employed to work in quarry A, or in the top seam, goes into quarry B, or the lower seam. He is not then in the course of his employment at all.³

The question to be determined here is whether the present case is one of that description. One of the purposes of this man's employment, in fact the whole purpose at the moment, was to drill a

³The exact language of the Lord President (Dunedin) was: "There are two ways in which a servant may be without the sphere of his employment. One way—and in these cases the question is generally of easy solution—is where the servant does some other sort of work than that for which he is engaged. To take a very simple and obvious instance,—if the footman on the box of a carriage, without the consent of the coachman, took it into his head to drive his horses, there would be no question that if any accident happened it would be in the course of his employment, for it is not part of a footman's business to drive, although it is part of his business to sit on the box. The other class of cases which raise more difficult questions is where a servant goes into what I think I may call a territory with which he has nothing to do."

hole from the bogey to the top hole. Was it within the scope or sphere of his employment to do that act from any point whatsoever? That is a question of fact to be determined. Was he in like case with the man employed to hew in the top seam and not in the lower seam, or to quarry in A and not in B? The top hole is, in my illustration, equivalent to the lower seam, in which I have been supposing that the ventilation was imperfect, and the place dangerous. He had no business there at all. It was not merely that he was not to go to a place—that, as I will point out presently, may be serious and wilful misconduct. His employment was to drill a hole, working at a certain place to the exclusion of a certain other place. Directly he went to the latter place he was outside the course of his employment, or what has been called the scope or sphere of his employment. Those words “scope or sphere” seems to me not misleading; they are useful words: you have to see whether it is in the course of the employment, and if the employment be a limited employment (as it always is), then you have to see what are its limits, and its limits are defined by seeing what is its sphere or its scope.

I want to add something lest this judgment should be misunderstood. The question is not whether the man in the course of his employment went to a forbidden place. If that be it, there may be simply serious and wilful misconduct, and he may be entitled to recover. The question is: Has the man done an act outside the sphere of his employment, or has he in doing an act within the sphere of his employment been guilty of serious and wilful misconduct? If it be the former he is not entitled to recover; if it be the latter he is.

Let me give an illustration as to place. Suppose a man is employed in a factory and his duty is to go to and fro in the factory to carry goods, and he is told that he must always go by this passage and return by that passage. I am supposing a rule or regulation simply for the purpose of freedom of circulation in the factory. If he goes by the passage by which he ought to return, he will have broken a rule as to place, but he will not be out of the course of his employment; he will be there for the purpose of his employment doing an act within the sphere of his employment, carrying goods or whatever it may be, but doing it in a forbidden way.

As regards the case of *Conway v. Pumpherson Oil Co., Ltd.*, it is, I agree, exceedingly pertinent to this case, and I may say my mind goes with the Lord President entirely in the illustration that he gives of the way in which the case is to be treated; but what I have looked for, and looked for in vain, is to see by what course of reasoning the Lord President arrived at his conclusion when he said “The mere fact he went into the upset does not take him outside the sphere of his employment.” I can not find any reasoning leading to that. If there was reasoning which led to the conclusion that it was within the sphere of his employment, although he went there by way of misconduct, or that it was not so, I need not say I would have considered that and given effect to it to the best of my ability, but while I follow the Lord President as to the indication which he

gave of the lines which ought to guide him, I fail to find any reasoning which led him to the conclusion, and therefore I am unable to assist myself by following that reasoning in dealing with the present case.

I only want to add out of respect to the Master of the Rolls, who has expressed a different opinion, that *Weighill v. South Hetton Coal Co.*, seems to me to be the same as this case. It can not constitute any difference that it was to the pecuniary advantage of the man, to go to the forbidden place. The whole question is whether it was forbidden in the sense that it was misconduct to go there, or whether he was out of his employment when he went there. In the case of *Weighill v. South Hetton Coal Co.*, the facts were that the collier was sent to work in one place and he went and worked in another place. As it happened, the latter place was a dangerous place, and what we held was that when he went there he was out of the scope of his employment altogether. To my mind it makes no difference that the motive that led him to go there was a motive which was for his pecuniary advantage. The whole question is whether he ought to have gone there or not; directly we found he should not have gone there, then to my mind the limits of his employment were exceeded and he was not within the Act at all. For these reasons it seems to me the judgment of the county court judge was wrong. I have indicated where it appears to me that it goes wrong. I think this appeal ought to be allowed.

KENNEDY, L. J. I think that the learned county court judge was justified in coming to the decision which is under appeal. (After stating the facts, his Lordship continued.) That which the deceased did in breach of the directions previously given by his superiors and the regulations of the mine constituted, I agree with the learned county court judge, serious and wilful misconduct. But this fact will not of itself operate to deprive his dependents of the right to compensation under the Act. That right depends upon proof that the death of the deceased was due to an accident in the course of and arising out of his employment.

Now his employment was, in my view, to drill the air passage through the coal from the bogey into the top hole; and, unquestionably, this breach of duty and of orders was committed by him in order successively to carry out and whilst he was engaged in carrying out the purpose of this employment. It appears to me in these circumstances that the fatal accident was none the less an accident in the course of and arising out of his employment, because he did not confine his operations to the area of the bogey as he ought to have done. I see in such a case no sound distinction of principle between breaking instructions as to place and breaking instructions as to the use of machinery, or any other limitation imposed by the employer.

Take the case of a workman ordered to clean a high window, and at the same time to do that work only from the inside of a room and not to step outside; or, still nearer to the present case, the case of a workman ordered to break through the ceiling between two

floors of a house, and told at the same time to work only from the upper floor; it is no doubt wilful misconduct, and might in some circumstances be serious misconduct, of the workman in each of these cases to do the work without also complying, in the manner of doing it, with the instructions he has received; but none the less, as it appears to me, if he disobeys, solely for the purpose of the work, and meets with a fatal accident, his death may be held to be due to an injury in the course of and arising out of his employment. Provided that he meets his death by accident in the performance of the particular piece of work which it is his duty to do, I do not think that the mere fact of non-compliance with a limitation as to area, any more than the mere fact of non-compliance with a limitation as to method, if the purpose of the non-compliance is the effective furtherance of the purpose of the workman's proper task, ought to be held necessarily, or indeed ordinarily, to put his death by the resulting accident outside the employment so as to exclude his dependents from the benefit of this Act of Parliament. It is with the utmost diffidence that I venture to criticize any expression which appears in a judgment of Lord Collins as in *Whitehead v. Reader*, (1901) 2 K. B. 48; but "sphere of employment" appears to me to be rather a dangerous metaphorical expression, in so far as it tends to introduce a suggestion of special importance, in regard to section 1 of the Act, of the workman's obedience to an order as to the local area of working.

I am of opinion that this appeal should be dismissed.

Appeal dismissed.

(b) "Arising out of the employment."¹

ARMITAGE *v.* LANCASHIRE AND YORKSHIRE
RAILWAY CO.

Court of Appeal, England, 1902. L. R. (1902), 2 K. B. Div. 178.

COLLINS, M. R. In this case the county court judge has held that the respondent was entitled to compensation under the Workman's Compensation Act, 1897. But the question arises here whether an accident, happening as this accident undoubtedly happened, can in point of law be said to be an accident arising out of and in the course

¹ This phrase is used in the Workmen's Compensation Acts of Arizona, California, Connecticut, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon and Rhode Island. In Arizona, whose act is limited to certain enumerated "especially dangerous" employments, the injury must also "be due wholly or partly to a necessary risk of employment or to failure of employer, or any of his employes, to exercise care or comply with any law." In the West Virginia Act and in the Kentucky Act, declared unconstitutional on December 11, 1914, in *State Journal Co. v. Workmen's Compensation Board*, 170 S. W. 437 (1914), the very similar phrase "resulting from" the employment is used. While in Ohio, Texas or Washington, neither

of the employment within the meaning of the Workmen's Compensation Act, 1897. I do not think that it can. The accident in this case, no doubt, happened while the respondent was engaged in his employment, through the act of some one who was engaged in the same employment, but that act was one which had no relation whatever to the employment. A boy, engaged in the same work as the respondent, in anger threw a piece of iron at another boy, which missed him, and hit the respondent. This was a wrongful act entirely outside the scope of the employment. The statute does not provide an insurance for the workman against every accident happening to him, while he is engaged in the employment of his master, but only against accidents arising out of and in the course of that employment. The argument put forward by the appellants' counsel may not furnish an exhaustive test as to what is or is not an accident arising out of and in the course of the employment; but I think it is at any rate a useful guide in dealing with that question to see whether the act which caused the accident was or was not entirely outside the scope of the employment of the person who committed it. We have to consider what sort of accident the Legislature contemplated, when they spoke of accidents arising out of and in the course of the employment. Did they intend to give compensation to the workman for injuries occasioned to him, while engaged in his employment, by an accident arising from any act which might be done by another workman engaged in the same employment, although it might have no relation whatever to that employment? I think that it is obvious that they did not so intend. The fact that a boy in the same employment as the respondent, having a grudge against another boy, threw something at him, which missed him and hit the respondent, can not in my opinion be described as an accident arising out of the employment; the accident did not arise from anything which by any stretch of language can properly be said to be incidental to the employment of either of the boys. It was as entirely outside the scope of the employment of the one to do the act which caused the injury, as it was outside the scope of the employment of the other to be exposed to such an injury. A similar point to that arising in this case was discussed in Scotland in the case of *Falconer v. London and Glasgow Engineering and Iron Shipbuilding Co.*, 3 F. 564.

COZENS-HARDY, L. J. I agree. I think that the contention for the respondent really involves the erasure of the words "out of" from the section. That contention in effect was that, the accident having occurred in the course of the employment, it is immaterial

the phrase "arising out of the employment" nor any other phrase of similar meaning is used. In *Lindauer v. Hoening*, 150 N. W. 996 (Wis. 1915), the provisions that compensation is payable "where at the time of the accident, the employé is performing service growing out of and incidental to the employment" and "where the injury is proximately caused by accident" are held to convey a meaning identical with that of the "English Act," and the word "accident" being held to mean industrial accident, that is, one due to a risk peculiarly incident to the particular employment of the sufferer and not common to all mankind.

how it happened, with the exception possibly, that it must be caused by the act of somebody employed on the premises, and not that of a trespasser from outside. I can not assent to this contention. I think that some meaning must be given to the words "out of" in the section. They appear to point to accidents arising from such causes as the negligence of fellow-workmen in the course of the employment, or some natural cause incidental to the character of a business. An accident arising out of the dangerous nature of a business carried on,² and not involving any human agency, such, for instance, as spontaneous combustion of some material, might be said to arise out of the employment. But I do not think that an accident caused by the tortious act of a fellow-workman having no relation whatever to the employment can be said to arise out of the employment. Appeal allowed.³

STUART McNICOL'S CASE.

Supreme Judicial Court of Massachusetts, 1913. 215 Mass. 497.

RUGG, C. J. This is a proceeding under Statute 1911, chap. 751, as amended by Statute 1912, chap. 571, known as the Workmen's Compensation Act, by dependent relatives for compensation for the death of Stuart McNicol.

1. The first question is whether the deceased received an "injury arising out of and in the course of his employment," within the meaning of those words in Part II, § 1, of the act. In order that

² And this though the fellow workman acts in express disobedience of orders, *Scott v. Payne Bros. Inc.*, 85 N. J. L. 446 (1914), and by so doing goes outside of "the sphere of his or her employment" and is doing work not entrusted or even prohibited to such fellow workman, *Geary v. Ginzler & Co.*, 108 L. T. 286 (C. A. Eng., 1913), 6 B. W. C. C. 72.

³ Accord: *Wilson v. Laing*, 1909, Sess. Cases 1230 (Sc. Ct. Sess.), 2 B. W. C. C. 118, housemaid injured by a ball of her employer's child thrown at her in play by the latter's nurse; *Fitzgerald v. Clarke & Sons*, L. R. 1908, 2 K. B. 796, 1 B. W. C. C. 197; *Cole v. Evans, etc. Co.*, 4 B. W. C. C. 138 (1911); *Wrigley v. Nasmyth, Wilson & Co.*, 6 B. W. C. C. 90 (C. A. Eng., 1913), a case rather doubtful on its facts; but see, *In re Mack*, Bulletin Ind. Com. of Ohio, Vol. 1, No. 21, p. 120 (1914). So where a fellow employe's life or the master's property is imperilled by larking, injuries sustained by a workman while going outside his usual sphere of employment to preserve either, do not "arise out of and in the course of his employment", see *Muller v. Stewart*, and *Lanarkshire Steel Co. v. Powell*, notes to *London etc. Co. v. Brown*, ante, p. 36.

Where the fellow-servant's act is designed to further the work entrusted to him and is appropriate thereto, the fact that it is excessive and that there is bad blood between him and the sufferer does not defeat recovery, *McIntyre v. Rodgers*, 6 Fraser 176 (Sc. Ct. Sess. 1904), compare *Baird & Co. v. Burley*, 1908 Sess. Cases 545 (Sc. Ct. Sess.), 1 B. W. C. C. 7, where the plaintiff who was trying forcibly to get an appliance needed for his work back from fellow workers who had carried it off in joke, was injured by a handful of rubbish thrown by the latter more or less in playful retaliation. So where a workman is engaged in his ordinary duties and injured while removing a tin can as a joke placed on his machine is entitled to compensation, *Knopp v. American Car & F. Co.*, 186 Ill. App. 605 (1914).

compensation may be due the injury must both arise out of and also be received in the course of the employment. Neither alone is enough.

It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words which shall accurately include all cases embraced within the act and with precision exclude those outside its terms. It is sufficient to say that an injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It "arises out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which can not fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.¹

¹ *Accord: Weekes v. W. Stead & Co.*, 30 T. L. R. 586 (C. A. Eng. 1914), dependents of a foreman, who had to decide between rival applicants for employment as van drivers, a notoriously rough class, and was killed by an assault made on him by an applicant to whom he had refused employment, held entitled to compensation, *aliter*, had he been similarly assaulted by a customer. So in *Resdale v. S. S. Kilmarnock*, 59 Sol. Journ. & W. R. 145 (C. A. Eng. 1915), the risk of being blown up by an enemies' mine was held to be incidental to the employment of a trawler in the North Sea during the war between England and Germany, and see *Thorn v. Humm & Co.*, 44 County Ct. Chronicle 535 (1914), taxicab driver taking officers to a fort shot by sentry whose challenge he had not heard or had disregarded. See also, the dictum in *Murphy v. Berwick*, 43 Ir. L. T. 126 (C. A. Ir. 1909), 2 B. W. C. C. 103, to the effect that while the risk of injury while fleeing from the advances of a drunken guest who had invaded the kitchen, was not incidental to the employment of a cook in a hotel, it might be incidental to the employment of a bar-maid. The risk of attack by a drunken outsider, annoyed by the employ   in the performance of his duties, is not incidental to the employment, unless it necessarily brings him into contact with a notoriously rough or quarrelsome class of intruders, *Mitchinson v. Day Brothers*, L. R. 1913, 1 K. B. Div. 603, 6 B. W. C. C. 190. Nor are risks of injury while protecting the master's person from assault incidental to the work of a foreman of sewage works, *Collins v. Collins*, (1907) 2 Ir. R. 104. Even a murderous attack by the employer himself upon his errand boy was held not incidental to the latter's employment, *Blake v. Head*, 106 L. T. 822 (C. A. Eng. 1912), 5 B. W. C. C. 303.

Compare *Rowland v. Wright*, L. R. 1909, 1 K. B. Div. 963, 1 B. W. C. C. 192, where a stableman bitten by a stable cat was given compensation—

The exact words to be interpreted are found in the English workmen's compensation act, and doubtless came thence into our act. Therefore decisions of English courts before the adoption of our act are entitled to weight. *Ryalls v. Mechanics' Mills*, 150 Mass. 190. It there had been held that injuries received from lightning on a high and unusually exposed scaffold, *Andrew v. Failsworth Industrial Society*, (1904) 2 K. B. 32; from the bite of a cat habitually kept in the place of employment, *Rowland v. Wright*, (1909) 1 K. B. 963; from a stone thrown by a boy from the top of a bridge at a locomotive passing underneath, *Challis v. London & Southwestern Railway*, (1905) 2 K. B. 154; and from an attack upon a cashier traveling with a large sum of money, *Nisbet v. Rayne & Burn*, (1910) 2 K. B. 689, all arose in the course and out of the employment, while the contrary had been held as to injuries resulting from a piece of iron thrown in anger by a boy in the same service, *Armitage v. Lancashire & Yorkshire Railway*, (1902) 2 K. B. 178; from fright at the incursion of an insect into the room, *Craske v. Wigan*, (1909) 2 K. B. 635; and from a felonious assault of the employer, *Blake v. Head*, 106 L. T. Rep. 822.

The definition formulated above, when referred to the facts of these cases, reaches results in accord with their conclusions. Applying it to the facts of the present case, it seems plain that the injury of the deceased arose "out of and in the course of his employment." The findings of the Industrial Accident Board in substance are that Stuart McNicol, while in performance of his duty at the Hoosac Tunnel Docks as a checker in the employ of a firm of importers, was injured and died as a result of "blows or kicks administered to him by * * * (Timothy) McCarthy," who was in "an intoxicated frenzy and passion." McCarthy was a fellow workman who "was in the habit of drinking to intoxication, and when intoxicated was quarrelsome and dangerous, and unsafe to be permitted to work with his fellow employes, all of which was known to the superintendent Matthews," who knowingly permitted him in such condition to continue at work during the day of the fatality,—which occurred in the afternoon. The injury came while the deceased was doing the work for which he was hired. It was due to the act of an obviously intoxicated fellow workman, whose quarrelsome disposition and inebriate condition was well known to the foreman of the employer. A natural result of the employment of a peaceable workman in company with a choleric drunkard might have been found to be an attack by the latter upon his companion. The case at bar is quite distinguishable from a stabbing by a drunken stranger, a

such a cat being said to be "a part of the necessary furniture of a stable"—though there was no suggestion that the employer knew that the cat was vicious. Had the cat been a strange cat wandering into the stable, *Cozens-Hardy, M. R.*, intimated his strong opinion that there would have been no liability. See *Amys v. Barton*, L. R. 1912, 1 K. B. Div. 40, where a farm laborer was stung by wasps, which, while apparently resident upon the farm, were not brought or maintained upon the premises by the farmer as part of the "furniture" of the farm.

felonious attack by a sober fellow workman, or even rough sport or horseplay by companions who might have been expected to be at work. Although it may be that, upon the facts here disclosed, a liability on the part of the employer for negligence at common law or under the employers' liability act might have arisen, this decision does not rest upon that ground, but upon the causal connection between the injury of the deceased and the conditions under which the defendant required him to work. A fall from a quay by a sailor while returning from shore leave, *Kitchenham v. Owners of S. S. Johannesburg*, (1911) 1 K. B. 523; S. C. (1911) A. C. 417; a sting from a wasp, *Amys v. Barton*, (1912) A. C. 35, all have been held to be injuries not "arising out of" the employment. But we find nothing in any of them in conflict with our present conclusion. Nor is there anything at variance with it in *Mitchinson v. Day Brothers*, (1913) 1 K. B. 603, where it was held that injuries resulting from an assault by a drunken stranger upon an employé engaged at his work on the highway did not arise out of the employment. That was a quite different situation from the one now before us.

It follows that the decree must be reversed and a new decree entered as required by this opinion.

So ordered.

FRITH v. OWNERS OF S. S. LOUISIANIAN.

Court of Appeal, England, 1912. L. R. 1912, 2 K. B. 155.

An appeal by the employers from an award of His Honor Judge Shand of the County Court at Liverpool.

The deceased was a seaman. He left his ship, as the County Court Judge found, without leave. The ship was just turning preparatory to leaving the quay, when the deceased returned, hopelessly intoxicated. He was helped along the quay by a negro, who, when sufficiently near the boat, with the help of another man threw the deceased like a sack of sand on to the deck. He fell on his hands and knees. After a moment or two he staggered to his feet and lurched overboard at a part where the rail had not yet been replaced, and was drowned. Upon the hearing of an application for compensation by the dependents, the County Court Judge held that, as the man had returned to the ship, the ambit of his employment, the accident arose out of and in the course of his employment.

The employers appealed.

COZENS-HARDY, M. R. This is an appeal from his Honour Judge Shand, who has given a judgment which shows very great care, and which I regard with the utmost possible respect. The facts which he finds, and which are not in dispute, are that the deceased was a sailor on a ship at Mobile. He and the bo'sun, without leave, went on shore. The vessel was on the point of starting. It had been close to the quayside. The tug was at work pulling it round. The bo'sun was able to walk along the quay, and get on the

vessel and go to his room. Frith was in a far more advanced state of intoxication. The Judge finds that he could not walk alone. A negro helped him along the quay, and when he got alongside part of the ship, the negro, with another man who happened to be on the quay, pushed him on to the deck, so that he fell there on his hands and knees, and as though he had been a sack of sand. He was obviously totally incapacitated from discharging any of the duties which appertained to his office. After a few minutes Frith arose, reeled backward, and fell over the side of the vessel, which by that time had got two or three yards from the quayside. In that particular part of the vessel the rail had not been replaced. The Judge has said, if the sailor got on board the ship he was within the ambit of his employment, and, with great reluctance, once having regained the ship, he must hold that the accident arose out of and in the course of the employment. I think that it is a mistaken view of the law. You have to satisfy yourself in the first place—Has the accident arisen in the course of the employment?—for which purpose the question—Has he got on the ship?—is a very important matter. Assume that he is in the course of his employment, the question then is, Was this an injury by accident arising out of the employment, or an accident arising solely by reason of the intoxication of this man?

It seems to me perfectly idle to say that the matter is solved when the man got within the area of his employment. It has been held that a sailor will not recover compensation if his injuries are due to skylarking, or unless you can show that the injury by accident is by an accident which was in some way connected with the work he was doing by which he was exposed to special danger. If the man had been engaged on the mast when he was the worst for drink, and was sent up there in that state, that would be an accident arising out of the employment. Here the man did not get back to his work in a condition enabling him to do his work. The injury was not due to an accident arising out of his employment, but due solely to hopeless drunkenness. I have the satisfaction of feeling that the Judge would gladly have come to the conclusion which I have. It is a case which is clearly outside the whole line of authorities.

FLETCHER MOULTON, L. J. I am of the same opinion. I think the Judge thought if the sailor was on board the ship anything that happened would be within the Act. That is not so. It has to arise out of the employment. This accident had nothing to do with the employment except that he was in the same place. It arose entirely out of his drunken condition.

BUCKLEY, L. J. In *Barnes v. Nunnery Colliery* (1912), A. C. 44; *ante*, p. 195, EARL LOREBURN, L. C., says this: "The question whether or not an injury by accident arose out of the employment is quite different from the question whether there has or has not been misconduct. An arbitrator has to ask himself, Was the injury by accident caused by something reasonably incidental to the employment, by some risk to which a workman * * * might be

exposed in doing what he had to do?" Misconduct is no defense to a claim "arising out of the employment." The whole question is whether this accident arose out of his employment. I have not the smallest hesitation in answering that in the negative. He was there drunk. He could not stand, and was so drunk that he was thrown on the deck like a sack of sand. He staggered to his legs and fell over the side of the ship. He was within the ambit of his employment, but the accident did not arise out of the employment. I think the appeal ought to be allowed.

Appeal allowed.¹

BRYANT, ADMX. *v.* FISSELL.

Supreme Court of New Jersey, 1913. 84 N. J. L. 72.

TRENCHARD, J. This writ brings up for review a judgment of the Essex County Common Pleas Court in an action brought by Elizabeth Bryant, administratrix, &c., and widow of Richard Bryant, deceased, on behalf of herself and the next of kin, to recover from Richard Bryant's employer compensation for his death.

The learned trial judge found, among others, the following matters of fact: "That Richard Bryant, deceased, was on the 25th day of April, 1912, employed by respondent (prosecutor), William H. Fissell, as a journeyman carpenter; that on the 25th day of April, while engaged in his duties as carpenter, in the employ of the respondent (prosecutor), he received injuries by reason of a heavy bar of metal falling upon his head from one of the upper stories of a building being erected at the corner of Market and Beaver streets, in the city of Newark, which said injuries caused the death of the said Richard Bryant; that the falling of the said bar of metal was not caused by any of the employes of the said respondent (prosecutor), but by an employé of some other and independent contractor, who had work to do on said building; that said injury arose out of and was in the course of his employment."

Hitherto the pertinent language of paragraph seven of our act, "by accident arising out of and in the course of his employment," has not been construed by this court.

But the language is identical with the language of the British Workmen's Compensation Act of 1906 (6 Edw. VII., c. 58), and therefore cases in that jurisdiction construing that language in their act will be useful in construing the same language in our own.

To warrant a recovery it must appear that Bryant's death was caused by (a) an accident, (b) arising out of, and (c) in the course

¹ *Accord: Nash v. S. S. Rangotiro*, L. R. 1914, 3 K. B. 978; *Renfrew v. McCrae*, 1914 Sess. Cases 539 (Sc. Ct. Sess.); *Fraser v. Reddell & Co.*, 1914, Sess. Cases 125 (Sc. Ct. Sess.), engine-driver, so drunk as to be unfit for his work, fell from the foot plate of his engine and was run over and killed; but see *Williams v. Landudno Co.*, 59 Sol. Jour. & W. R. 286 (C. A. Eng. 1915.)

of, his employment. Even though the injury arose out of and in the course of the employment, if it be not an "accident," within the purview of the act, there can be no recovery. Even if there be an accident which occurred "in the course of" the employment, if it did not arise "out of the employment," there can be no recovery; and even though there be an accident which arose "out of the employment," if it did not arise "in the course of the employment," there can be no recovery. *Fitzgerald v. Clarke & Son* (1908), 2 K. B. 796; *Craske v. Wigan* (1909), 2 K. B. 635.

The burden of furnishing evidence from which the inference can be legitimately drawn that the death of an employé was caused by "an accident arising out of and in the course of his employment" rests upon the claimant. *Barnabas v. Bersham Colliery Co.* (1910), 102 L. T. 621; and on appeal (1910), 103 L. T. 513.

For an accident to arise out of and in the course of the employment, it must result from a risk reasonably incidental to the employment. As was said by Mr. Lord Justice Buckley in *Fitzgerald v. Clarke & Son* (1908), 2 K. B. 796: "The words 'out of' point, I think, to the origin and cause of the accident; the words 'in the course of' to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incidental to the employment."

We conclude, therefore, that an accident arises "in the course of the employment" if it occurs while the employé is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.

That the finding of fact in the present case justified the conclusion that the accident to Bryant occurred "in the course of" his employment, is beyond dispute.

We are also of the opinion that the conclusion of the Common Pleas judge that the accident arose "out of" the employment was likewise justified.

The prosecutor argues that there can be no recovery because the bar of metal which killed Bryant was caused to fall by a workman of an independent contractor doing work on the same building.

We think there is no merit in this contention.

In *Challis v. London and Southwestern Railway Co.* (1905), 2 K. B. 154, an engine driver, while driving a train under a bridge, was injured by a stone dropped by a boy from the bridge. It was held that his injuries were caused by an accident arising "out of" and in the course of his employment. Master of the Rolls Collins said: "We must, I think, approach the question whether what occurred was a risk incidental to the employment of an engine driver from the standpoint that a train in motion has great attractions for

mischievous boys as an object at which to discharge missiles. It seems to me that the Legislature, in framing the Workman's Compensation Act (1897), intended to provide for the risks of accident which are within the ordinary scope of the particular employment in which the workman is engaged. No doubt the act does not use the express 'risks incidental to the employment,' but the interpretation of the words 'accident arising out of and in the course of the employment' appears to me necessarily to involve the consideration of the question what risks are commonly incidental to the particular employment in question." Lord Justice Cozens-Hardy said that the risk of such an occurrence was one which might reasonably be looked upon as incidental to the employment of an engine-driver, though it might not be incidental to other employments, and *Armitage v. Lancashire and Yorkshire Railway Co.* (1902), 2 K. B. 178 (upon which the prosecutor in this case relies), was distinguished on the ground that where the accident was not one of the risks to which it was within the scope of the employment of the workman to submit.

We conclude, therefore, that an accident arises "out of" the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment as incidental to it.¹ That this is so appears from an examination of *Armitage v. Lancashire and Yorkshire Railway Co.*, *supra*; *Collins v. Collins* (1907), 2 I. R. 104; *Murphy v. Berwick* (1909), 43 Ir. L. T. 126; and *Blake v. Head* (1912), 106 L. T. 822, in each of which recovery was denied because the act of the third party was not a risk reasonably to be contemplated by the employ   in undertaking the employment.

A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service, *Pope v. Hill's Plymouth Co.* (1910), 102 L. T. 632, and on appeal (1912), 105 L. T. 678.

In the present case the Common Pleas judge found as a fact that decedent, while at work for his employer, the prosecutor, as a journeyman carpenter, on a building in course of erection, was killed by the falling of a bar of metal from one of the upper stories, which was caused to fall by a workman of an independent contractor who had work on the same building. Under the authorities cited, the judge was justified in concluding that his death was an accident arising "out of" his employment. The inference was clearly permissible that it was one the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it.

The judgment will be affirmed, with costs.²

¹ Compare Fitzgibbons, L. J., in *Collins v. Collins* (1907), 2 Ir. R. 104, p. 108, "I can not understand how an occurrence could arise out of and in the course of a particular employment, unless it was something the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it."

² Compare *Biddinger v. Champion Iron Co.*, Bulletin Ind. Com. of Ohio, Vol. 1, No. 7, p. 70.

PLUMB *v.* COBDEN FLOUR MILLS CO.

House of Lords, 1913. 109 Law Times Rep. 759.

A workman, who was employed at a flour mill to stack sacks by manual labor, made an improper use with that object of the revolving shafting of certain machinery which was erected in the mill. He was caught by the shafting and severely injured.

Appeal (*in formâ pauperis*) from an order of the Court of Appeal made on the 29th January, 1913, allowing with costs an appeal by the Cobden Flour Mills Company Limited against an award of the judge of the County Court of Denbighshire holden at Wrexham, dated the 10th December, 1912, in an arbitration under the Workmen's Compensation Act 1906.

The County Court judge found that although the method of doing the work adopted by the workman was unwise, it was not adopted for the greater convenience, pleasure, or profit of the workman, but the better to discharge his duty in the interests of his employers; and that the injury was caused by accident arising out of and in the course of his employment.

The Court of Appeal (Cozens-Hardy, M. R., Buckley and Hamilton, L. JJ.) reversed this decision, holding that the accident did not arise out of the employment.

The facts were stated by Lord Dunedin in his judgment as follows:

The appellant was a foreman worker in the employment of the respondents; and his duties on the day on which he was injured consisted in the task, assisted by other workmen, of stacking bundles of sacks in a room in the respondents' premises. The work was done by hand. In the room in which this was being done there ran along the ceiling a shaft which transmitted power to machines in other rooms, but there was no pulleys on the shaft in this room, and it was not used in connection with any machine in this room. The stack had arrived at the height of about seven feet, and the bundles could no longer be thrown up from the bottom. The appellant, who was on the top of the stack, then improvised a method of getting up the sacks. He put a rope round the revolving shafting, attached one end to the bundle, and sufficient tension being put on the other end of the rope to ensure friction, the sack was drawn up as by a crane. A bundle of sacks was drawn too far, and stuck between the shafting and the ceiling. The appellant, to free the bundle, cut the rope. The bundle fell, and falling on the bundle on which the appellant was standing, caused him to lose his balance. In his effort to recover equilibrium one arm got entangled with the rope which was round the shafting, he was pulled over the shafting, and severely injured.

LORD DUNEDIN. My Lords: I have not the slightest doubt as to the soundness of the judgment appealed from. As, however, we had the benefit of a very able judgment and a copious citation of

authorities, it may be of use to formulate the conclusions at which I have arrived.

The facts of the case are simple. (His Lordship then stated the facts as set out above, and continued:)

The question for decision is, did the accident arise out of his employment? The Court of Appeal held that it did not, and I agree with them.

It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute. It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward, and only put forward by a judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the statute itself.

Under this reservation, I propose shortly to examine some of the tests which have been found useful in the various cases which have occurred where the point was whether or not the accident arose out of the employment.

The first and most useful is contained in the expression, scope or sphere of employment. The expression was used in an earlier case, the case of *Whithead v. Reader*, 84 L. T. Rep. 514; (1901) 2 K. B. 48, by Collins, L. J., who pointed out that the question of whether a servant had violated an order was not conclusive of whether an accident so caused did or did not arise out of the employment—and put as the test, Did the order which was disobeyed limit the sphere of the employment, or was it merely a direction not to do certain things, or to do them in a certain way within the sphere of the employment?

In the case of *Conway v. Pumpherson Oil Co.*, 1911, S. C. 660, in the Court of Session, I adopted the phrase of Collins, L. J., and pointed out that there were two sorts of ways of frequent occurrence in which a workman might go outside the sphere of his employment—the first, when he did work which he was not engaged to perform, and the second, when he went into a territory with which he had nothing to do. This case was approved and followed by the Court of Appeal in *Harding v. Brynddu Colliery Company*, 105 L. T. Rep. 55; (1911) 2 K. B. 747. The expression has been used in many other cases which it would be tedious and unnecessary to cite.

I am of opinion that this test is both sound and convenient, but it is not exhaustive, and it is not the most convenient for every statement of facts. Taken as it is, there may, and often will be, circum-

stances in which the application may be difficult and opinions may differ.

I pause here to notice an ingenious argument proposed by Mr. Davenport, founded on the cases I have cited. Founding on the cases of *Conway v. Pumpherston Oil Company* (*ubi sup.*) and *Harding v. Brynddu Colliery Company* (*ubi sup.*), he said: "If this man had been told not to touch this shaft he would have received compensation for he was doing his master's work, and it would have been merely disobedience. Why should he be worse off because he was told nothing about the shaft?" The fallacy of this consists in not advertg to the fact that there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.

In the case of *Barnes v. Nunnery Colliery Company*, 105 L. T. Rep. 961; (1912) A. C. 44, Lord Moulton put it thus: "The boy was guilty of disobedience; was this out of the scope of his employment?" Though Lord Moulton arrived at a different result on the facts from that of the majority of the Court of Appeal, and that of this House, yet no fault is to be found with the question as put, and in this House the Lord Chancellor (Earl Loreburn) said the same thing in other words: "Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do, and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." The Lord Chancellor there put the test cumulatively, because that fitted the facts of the case in which boys in a mine rode in tubs, a thing they were not employed to do, and which they had been expressly told not to do. But I imagine the proposition is equally true if he had expressed it disjunctively, and used the word "or" instead of "also."

In the cases in which there is no prohibition to deal with, the sphere must be determined upon a general view of the nature of the employment and its duties. If the workman was doing those duties he was within it, if not he was without it, or, to use my own words in the case of *Kerr v. William Baird* (1911, S. C. 701), an accident does not arise "out of employment" if at the time the workman is arrogating to himself duties which he was neither engaged nor entitled to perform.

As I have already said, however, the question of within or without the sphere is not the only convenient test. There are others which are more directly useful to certain classes of circumstances.

One of these has been frankly phrased interrogatively. Was the risk one reasonably incidental to the employment? And the question may be further amplified according as we consider what the

workman must prove to show that a risk was an employment risk, or what the employer must prove to show it was not an employment risk.

As regards the first branch, I think the point is very accurately expressed by Cozens-Hardy, M. R., in the case of *Craske v. Wigan* (100 L. T. Rep. 6; [1909] 2 K. B. 635), where he says, "It is not enough for the applicant to say, 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further, and must say, 'The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger.'"

As regards the second branch, a risk is not incidental to the employment when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself. Illustrations of the first proposition will be found in all the cases where the risk has been found to be a risk common to all mankind, and not accentuated by the incidents of the employment. In application to facts the dividing line is sometimes very nearly approached, but I think that in all the cases the principle to be applied has been rightly stated. The cases themselves are too numerous to cite, but I may mention as illustration the two lightning cases of *Kelly v. Kerry County Council* (42 Ir. L. T. Rep. 23) and *Andrew v. Failsworth Industrial Society Limited* (90 L. T. Rep. 611; [1904] 2 K. B. 32), where on the facts the stroke of lightning was held, in the Irish case, to be a common risk of all mankind; in the English case, a risk to which, by the conditions of employment, the workman was specially exposed. Both these cases, in my humble judgment, were rightly decided.

An illustration of the second proposition will be found in the case already cited of *Barnes v. Nunnery Colliery Company* (*ubi sup.*), where Lord Atkinson said: "The unfortunate deceased in this case lost his life through the new and added peril to which, by his own conduct, he exposed himself, not through any peril which his contract of service directly or indirectly involved or at all obliged him to encounter."

Lord Atkinson added the words "It was not, therefore, reasonably incidental to his employment. That is the crucial test." In the case of *Watkins v. Guest, Keen, and Nettlefolds Limited*, 106 L. T. Rep. 818, Lord Moulton criticised this sentence as cutting out the sub-section as to serious and wilful misconduct. With great deference to my noble and learned friend, I think he was forgetting that Lord Atkinson was only applying a test, and not substituting it for the words of the Act. I can not see that the serious and wilful misconduct section really introduces any difficulty. Reverting to the words of the Act, you have first to show that the accident arises out of the employment. Then in the older Act came the rider that even when that was so the workman still could not recover if the accident was due to the serious and wilful misconduct of the workman himself—a rider limited in the later Act to cases where death has not

ensued. But the very fact that it is a rider postulates that the accident is of the class which arises out of the employment. A man may commit such a piece of serious and wilful misconduct as will make what he has done not within the sphere of his employment. But if death ensues and his dependents fail to get compensation it will not be because he was guilty of serious and wilful misconduct, but because the thing done, irrespective of misconduct, was a thing outside the scope of his employment.

Tried by either of the two tests I have examined, the appellant in this case seems to me equally to fail. But he does not fail, because he was acting outside the sphere of his employment, or because by his conduct he brought on himself a new and added peril, but because he has failed to show any circumstances which could justify a finding that the accident to him arose "out of his employment."

LORD ATKINSON.—I concur.

Appeal dismissed.¹

¹ *Accord: Marriott v. Brett & Benny, Ltd.*, 5 B. W. C. C. 145 (C. A. Eng., 1911), baker, desiring to mix his dough in absence of engineer, started engine himself, though forbidden to do so, *Whiteman v. Clifden*, 6 B. W. C. C. 49 (C. A. Eng., 1913), boy employed to dust rooms on upper story, on his way up to his work in a lift undertook to dust the top of the lift and in so doing was injured; *Davies v. Crown Perfumery Co.*, 6 B. W. C. C. 649 (C. A. Eng., 1913), soap stamper, who was supposed to make himself "handy about the place" when not stamping soap, was injured from a machine in motion while assisting another workman to remove a piece of soap which stopped the use of the machine; *Kerr v. Baird*, 1911 Sess. Cases 701 (Sc. Ct. Sess.), miner arranged and fired a shot, though prohibited to do so, a special "shot firer" being employed to do such work, compare *Smith v. Fife Coal Co.*, 30 T. L. R. 502 (H. of L. 1914); *McDiarmid v. Ogilvy Bros.*, 50 Sc. L. R. 883 (Sc. Ct. Sess. 1913), 6 B. W. C. C. 878, workman employed to work as an under-man at a mangle, on certain days he assisted the head man to clean the mangle but such cleaning was expressly forbidden when the machine was in motion, on a day other than a cleaning day and in the absence of the head man he attempted to oil the machine while it was in motion and was injured; and see *Wemyss Coal Co. v. Symon and Rivie v. Cumming*, cited in note 1 to *McDaid v. Steel*, *post*, p. 64. See also, *Smith v. Stanton Iron Works*, 6 B. W. C. C. 239 (C. A. Eng., 1913).

The Irish courts on the other hand, seem to regard the overzealous act of a servant, who having "too great an appetite for work" goes beyond his prescribed duties and, in a misguided effort to further his master's interests, does work assigned to another employé does not forfeit his right to compensation, *Greer v. Lindsay Thompson*, 46 Ir. L. T. 89, 5 B. W. C. C. 586 (C. A. Ir., 1912), *Tobin v. Hearn*, (1910) 2 Ir. R. (K. B.) 639.

In the following cases the orders disobeyed were held to prescribe the method of work and not to define or "limit the sphere of the employment" and compensation was allowed, *Mawdsley v. West Lehigh Colliery Co.*, 5 B. W. C. C. 80 (C. A. Eng., 1911), a workman who was employed to oil machinery did so when it was in motion though this was expressly forbidden, compare *McDiarmid v. Ogilvy Bros.*, 50 Sc. L. R. 883 (Sc. Ct. Sess. 1913), 6 B. W. C. C. 878, *Chitton v. Blair & Co.*, 30 L. T. R. 623 (C. A. Eng., 1914), a workman though ordered to do his work standing, sat down while at work and in consequence got his foot caught in the moving machinery, and *Astley v. Evans*, L. R. 1911, 1 K. B. 1036, 1911 A. C. 674, a brakeman to make his work easier tried to climb from one moving train to another; compare with the last two cases *Rivie v. Cumming*, note to *McDaid v. Steel*, p. 64; *Pepper*

BARNES v. NUNNERY COLLIERY COMPANY, LIMITED.

House of Lords, 1912. L. R. 1912, Appeal Cases 44.

A boy employed at a colliery, noticing that an endless rope having a number of empty tubs attached to it was about to start for a level where his work was, jumped into the front tub with three other boys in order to ride to his work instead of walking as he ought to have done, and in the course of the journey his head came in contact with the roof of the mine and he was killed. It was a common practice for the boys to ride to their work in the tubs, but it was expressly forbidden and the prohibition was enforced as far as possible.

Appeal from an order of the Court of Appeal setting aside an award made by the judge of the Sheffield County Court under the Workmen's Compensation Act, 1906, in favor of the appellant.

EARL LOREBURN, L. C. My Lords, the more I see of these cases under the Workmen's Compensation Act, the more I feel that nearly all of them are in reality pure questions of fact, in regard to which the only function of a Court is to interpose when there is no evidence to support a particular finding.

The question whether or not an injury by accident arose out of the employment is quite different from the question whether there has or has not been misconduct. An arbitrator has to ask himself, was the injury by accident caused by something reasonably incidental to the employment, by some risk to which a workman,

v. Sayer, 30 T. L. R. 621 (C. A. Eng., 1914), farm overseer in attempting to get keys to a poultry house vaulted on to the window ledge and losing his balance fell and was killed; *Sanderson v. Wright, Ltd.*, 30 T. L. R. 279 (C. A. Eng., 1914), workman employed to inspect scrap iron, which required him to cross railway tracks, contrary to express orders attempted to cross while shunting was going on, *McWilliams v. Great Northern R. Co.*, 1914, 1 Scot. L. T. 294 (Ct. Sess.), railway porter in order to remove baggage more quickly got on foot-board of a carriage of a moving train.

Where the workman was when last seen engaged in the work assigned to him, the burden of proof rests on the employer to show that there was a departure from his prescribed sphere of employment rather than recklessness in doing his appointed task, *Astley v. Evans*, L. R. 1911, 1 K. B. 1037, 1911 A. C. 674.

Even disobedience of orders, though it enhances the perils of the employment, if necessary for the employé's safety, does not put the employé out of the ambit of his employment nor prevent an injury resulting therefrom from arising out of the employment, *Edmunds v. S. S. Peterston*, 28 T. L. R. 18 (C. A. Eng., 1911), 5 B. W. C. C. 157, ship's engineer asphyxiated by fumes from a stove which, contrary to orders, he had lighted in his cabin on an intensely cold night.

Nor will disobedience of even those orders which limit the sphere of employment bar recovery unless the workman is injured in consequence of such disobedience, *Smith v. Fife Coal Co.*, 30 T. L. R. 502 (H. of L. 1914), where a miner who in disobedience of orders connected the detonating wire to the charge but did not fire the shot which was done by a shot firer, who neglected his duty, which was to see before doing so that all persons in the vicinity, which of course included the injured miner, had taken shelter.

liable like other men to be careless and take short cuts, might be exposed in doing what he had to do?

The difficulty really is in applying this to the particular case. You can not say that this boy was employed to be prudent and cautious, and therefore deny him compensation if by reason of his want of prudence and caution he meets with an accidental injury.¹ Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment.

I mean that I should say so if I were a judge of the fact, for it is purely a question of fact. And where the county court judge has decided it, a Court of law has no right to set the award aside unless it is satisfied that there was no evidence which could justify such a conclusion. It is like the case of a judge ruling that there is no case to go to the jury.

The Court of Appeal has by a majority come to the view, for such it is in effect, that there was no evidence, and your Lordships take the same view. I am not prepared to differ. It is not by comparing the facts of one case with the facts of other cases and reasoning by analogy from the comparison that a safe conclusion can be reached, but by considering each time the meaning of the Act.

LORD ATKINSON. In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employ   does the work which he is employed to do may well be held in most cases rightly to be a risk incidental to his employment. Not so in the other case. For example, if a master employs a servant to carry his (the master's) letters on foot across the fields on a beaten path, or on foot by road to a neighboring post office, and the servant, having got the letters, went to the stables, mounted his master's horse, and proceeded to ride across the country to the post office, was thrown and killed, or went to his master's garage, took out his motor car, and proceeded to drive by road to the post office, came into collision with something, and was killed, it could not be held, I think, according to reason or law, that the injury to the servant arose out of his employment, though, in one sense, he was about to do ultimately the thing he was employed to do, namely, to bring his master's letters to the post.² In such a case the servant puts himself into a place he was not employed to be in, and had no right to be in—the

¹ Compare the case of *Wemyss Coal Co. v. Symon*, note 1 to *McDaid v. Steel*, *post*, p. 64.

² This is carried to its extreme in the case of *Smith v. Morrison*, 5 B. W. C. C. 161 (C. A. Eng. 1911), where the claimant ordered to get a money order at a particular local office, finding it closed, went on to the General Post Office

back of his master's horse, or the seat of his master's motor car. He was doing a thing he was not employed to do, and has no right to attempt to do, namely, to ride his master's horse across country or to drive his motor car. These were altogether outside the scope of his employment. He exposed himself to a risk he was not employed to expose himself to—a risk unconnected with that employment, and which neither of the parties to his contract of service could ever be reasonably supposed to have contemplated as properly belonging or incidental to it. The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter. It was not, therefore, reasonably incidental to his employment. That is the crucial test. It has been many times adopted. There was not, therefore, to my mind any evidence that the injury the deceased received arose out of his employment, and if the finding of the county court judge amounts to a finding that it did, it can not, I think, be sustained.

LORD MERSEY. It is true that the learned county court judge states, in the note of his judgment, that there was no reason to assume that the boy knew of the danger he was running. This may be true; but there is no evidence one way or other on the point. But it is immaterial. He knew that he was forbidden to ride in the tub, and that, in my opinion, is enough. The learned judge also finds that the boy was not riding for his own pleasure but for the object of his employers. For my part I think he was riding for his own pleasure, but this again is immaterial, and for the same reason.

It is no doubt true that one object which he had in view in getting into the tub was to reach his work, but the intention existing

and on the way was injured, his injury was held to be outside the course of his employment.

Accord: McLaren v. Caledonian R. Co., 48 Scot. L. R. 885 (Ct. Sess., 1911), a railway employé taking a short cut home along the tracks; *Hills v. Blair*, 148 N. W. 243 (Mich. 1914), *semble*; *Hendry v. United Collieries Co.*, (1910) Scot. Sess. Cas. 709, 3 B. W. C. C. 567, workman injured while leaving pit by path neither sanctioned nor expressly prohibited but obviously involving considerable danger; *Pope v. Hill's Plymouth Co.*, 102 L. T. 633, 3 B. W. C. C. 339 (C. A., 1910), boy attempting to climb moving trucks to steal a ride home, a practice obviously dangerous but not specifically forbidden; *Morrison v. Clyde Nav. Trustees*, (1909) Scot. Sess. Cas. 59, 2 B. W. C. C. 99, similar facts; *Powell v. Brynddu Colliery*, 5 B. W. C. C. 124 (C. A. Eng., 1913), but see *Clem v. Chalmers Motor Co.*, 178 Mich. 340, 144 N. W. 848, where it was held that the death of a carpenter, working on the roof of a shed, who in his hurry to get some hot coffee, provided by his employer, attempted to slide down a rope instead of waiting his turn to descend by a ladder, arose out of and in the course of his employment.

So compensation is denied an employé who selects an unnecessarily dangerous place to eat his food, *Brice v. Lloyd*, L. R. 1909, 2 K. B. 804, 2 B. W. C. C. 26, or attend to other wants of nature, *Thompson v. Flemington Coal Co.*, 48 Sc. L. R. 740 (Sc. Ct. Sess. 1911), *Rose v. Morrison & Mason*, 105 L. T. 2 (C. A. Eng., 1911), 4 B. W. C. C. 277, with which compare *Lawless v. Wigan Coal & Co.*, 1 B. W. C. C. 153 (Wigan Co. Ct. 1908), or pass his period of idleness, *Murray v. Allan Bros.*, 6 B. W. C. C. 215 (C. A. Eng., 1913).

in his mind can not, in my opinion, convert the forbidden act into a part of his employment. It is not as if the case had been one of emergency where the boy might have had a discretion to use the perhaps speedier, although the forbidden, means of reaching his destination. Nor is it as if the rule forbidding the act was notoriously disobeyed or not enforced. It was disobeyed, no doubt, but it was disobeyed surreptitiously and unknown to the employers. The act was, in my view, expressly prohibited, and there were no circumstances which could in any way justify the boy in disregarding the prohibition.

M'DAID *v.* STEEL.

Scottish Court of Session, 1911. 48 Scottish Law Reporter, 765.

LORD KINNEAR. The Sheriff-Substitute has in my opinion rightly decided the question put to us in the case, which, however, as so often happens, is a mixed one of fact and law; but the case is so stated that we can separate the questions of fact, upon which the Sheriff is final, and the question of law which may be properly appealed to this Court. The Sheriff-Substitute in his finding at the end of the stated case separates between fact and law in a perfectly distinct manner; but the appellant's counsel says—and I think there is ground for saying so—that in his finding in fact there is also involved law. He finds that what the appellant was doing when he met with this accident was outside the scope of his employment. He finds that as a fact, and he goes on to find in law that it was therefore an accident which did not come within the definition of the statute. But, then, it is said that although he was not directly employed to do what he did, it was still by legal implication one of the things which fell within the scope of his employment. In order to answer that I think it is necessary to see exactly what the Sheriff-Substitute says as to the facts.

The appellant was a message boy employed by a fishmonger in Paisley, and it was part of the duty for which he was employed to carry fish from his master's shop to the infirmary at Paisley. It is said that the kitchen of this infirmary is situated on the third story, and is reached by a staircase and also by a slow-moving hydraulic hoist. It is not, so far as I can see, said distinctly that the boy's duty was to deliver fish at the kitchen and not merely at the outer gate or door of the infirmary. But I think it may be fairly inferred from what the Sheriff says afterward that he holds the former to have been his duty. At all events it was frankly conceded by Mr. Moncrieff that it was his business to deliver fish at the kitchen of the infirmary on the third story. Therefore the appellant was still in the course of his employment when he was taking fish from the outer gate to the kitchen.

But then the Sheriff goes on to say that there were two ways in which he might reach the kitchen—one the ordinary way of going

up the stairs, and the other by using the hoist, the gate of which is on the ground floor and which is of simple construction, and is intended for carrying heavy loads from that floor to the kitchen. The sheriff again does not say distinctly that the hoist was not intended to be used or was not generally used for carrying a load of the description which the message boy had to carry. It may have been, so far as the findings of the Sheriff are concerned, that the man in charge of the hoist might allow or invite such loads to be taken up by the hoist. I do not think it is very material to consider, and we can not determine whether the fact is actually so or not. What is distinctly found is that the hoist was intended for carrying heavy loads, and that it was announced by a public notice to all persons entering the infirmary that the hoist was to be used only by servants of the institution and worked only by those specially authorized by the directors. All other persons were strictly prohibited from using or working the hoist.

Now the first inference to be drawn from that clearly is that this hoist was not the ordinary means of access for message boys going to the kitchen. Then the Sheriff goes on to say that it is not proved that the appellant had ever read this notice or had his intention directed to it; but that he had been on several occasions prior to the day of the accident forbidden to use and work the hoist. Then he gives a special instance of the appellant having been so forbidden on the evening of the 4th October, the day previous to the accident, when he had been found by the porter of the infirmary making his way toward the hoist and had been recalled and rebuked by him, and then and there ordered to carry his fish to the kitchen by way of the stairs, which he did. This being the arrangement at the infirmary, it is said that when the boy arrived at the infirmary on this particular occasion he found the gate of the hoist standing open, that he then entered the hoist and pulled the rope for himself and caused it to ascend, and that in the course of its ascent, he himself having thus put it in motion, and while it was still in motion, his foot got jammed between the floor of the hoist and the wall.

The Sheriff says that in doing this the appellant knew that he was doing wrong, and that immediately after the accident and before being removed from the hoist he voluntarily confessed that he had been forbidden to use the hoist. On these facts the Sheriff does not go on to find that the boy was guilty of serious and wilful misconduct. As he has not so found, it is not for us to consider whether that would have been a correct finding or not in the circumstances of this case. But I think the learned Sheriff was perfectly right in giving no judgment upon that point, because the primary question is the one which he decides, viz., whether the boy met with this accident in the course of his employment or not. Now he says that the appellant was not in fact within the scope of his employment when he was doing this thing. If this is a mere question of fact, the Sheriff's finding is conclusive and we can not disturb it.

But I am not at all disposed to dissent from Mr. Watt's view that this question may involve a question of law—of legal implica-

tion—as to what the employment of the boy really was. He was employed to carry fish from the fishmonger's shop, and to use the public streets, and also the ordinary means of access which it was necessary for him to use, in order to reach the place of delivery; and therefore it may be that the risks of accident incident to the ordinary means of access to the infirmity kitchen were risks incident to his employment. But I think it necessarily follows from the description of his employment that if he chose to enter an open hoist which he knew he was not entitled to enter, and took upon himself to work the lift, exposing himself to risks arising from his own conduct of machinery which it was not his business to operate, he thereby exposed himself to new risks which were not within the contract of employment which he made with his master. It was not an accident connected with his employment in any way. He was not employed to work a lift. Upon that simple ground I think the judgment of the Sheriff is right in fact that he was not employed to do what he did, but voluntarily exposed himself to risks which he was not invited nor authorized to incur, it follows, in my opinion, that the accident that happened to him did not arise out of and in the course of his employment. It arose out of an adventure which he chose to undertake for his own pleasure and in the course of his doing what he was not employed to do. I am therefore of opinion that the judgment of the Sheriff is right, and that we must answer the question of law in the affirmative. That is my opinion, and I must say that I have come to it without any hesitation.

I only desire to add that I am not prepared to assent entirely to all the findings which are contained in the general findings with which the learned Sheriff concludes his statement. I think he has combined a variety of different reasons of different degrees of cogency that bear more or less directly upon the point in issue, whereas the true ground of judgment, I think, is that the appellant was doing something he was not employed to do, and thereby incurred danger which would not have been incurred in the work in which he was employed.

The Court answered the question of law in the affirmative.¹

¹In *Wemyss Coal Co. v. Symon*, 49 Sc. L. R. 921 (Sc. Ct. Sess. 1912), 6 B. W. C. C. 298, the employé, a boy, who was sent on an errand, the employer supplying tramway fares, was injured in attempting to board a moving car, a practise not only dangerous but forbidden by the rules of the Tramway Co. The Court of Session reversed a finding of the sheriff-substitute in favor of the complainant, on the ground that in attempting to jump on the moving car, the boy "was wilfully taking an outside risk not incident to the reasonable requirements of duty," and see *accord: Jibb v. Chadwick*, 50 L. Journal 79 (C. A. Eng. 1915).

In *Revie v. Cumming*, 1911 Sess. Cases 1032 (Sc. Ct. Sess. 1911), 5 B. W. C. C. 483, a carter employed to look after the rear brakes of a "lorry" drawn by five horses, instead of walking by it as he should, seated himself on the front of the lorry, being called on to apply the brakes he jumped off the lorry and slipped and was run over. It was held that the injury, though received "in the course of his employment" did not arise out of it, being due to a risk not incidental to the employment but added to it by the claimant for purposes of his own; see *accord: Herbert v. Fox*, 59 Solicitor's Journal 249 (C. A. Eng. 1915).

CLIFFORD v. JOY.

Court of Appeal, Ireland, 1909. 43 Ir. L. T. 193.

A domestic servant who was outside the door of her employer's house drying her hair returned, in response to an order, to the house to take charge of a baby in a cradle within a couple of feet of the fire. She continued the operation of drying her hair; her sleeve was loose and caught fire, and from the injuries received she died. No one witnessed the occurrence, but, according to a statement made by the girl herself after the happening of the accident, her clothes caught fire whilst she was drying her hair.

Appeal by the employer from an award of A. Todd, K. C., Acting County Court Judge of Kerry.

Sir SAMUEL WALKER, Bart., L. C. On the facts stated there is not the smallest doubt that this poor girl had washed her hair and was drying it outside the house, when she was told to come in and take charge of the baby. She came in and proceeded to dry her hair at the fire, and to do that I have no doubt that she sat at the inside instead of the outside of the cradle. Her own statement was:—"Her sleeve was loose; she caught fire while she was drying her hair." That is an obvious statement of the facts which can not be gainsaid, and we can not send down the case to have that statement contradicted. It is not enough that an accident arises in the course of the employment; it must arise also out of and as an incident of the employment. Nobody can fail to see that but for the drying of the hair and the loose sleeve this accident would not have happened. It arose from the drying of the hair, which was no part of the employment.

FITZGIBBON, L. J. The real question is whether the blouse took fire because the girl was drying her hair near the fire. If we came to the conclusion that she was engaged at two operations—one in charge of the child, and the other drying her hair—the question is, which of the two brought her within reach of the fire and set her clothes on fire. She would not have been in the place in which she took fire by reason of being in charge of the baby, and there is ample proof that the accident wholly arose out of the operation of being engaged in drying her hair. The risk of taking fire while engaged in drying her hair was not one within the scope of her employment.

HOLMES, L. J., concurred.

Appeal allowed.

WARNER v. COUCHMAN.

Court of Appeal, England, 1910. L. R. 1911, 1 King's Bench Div. 351.

Appeal against the refusal of the judge of the Tenterden County Court to award compensation to an applicant under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether a journeyman baker whose right hand and arm had been injured by a frost-bite while out on his rounds with his employer's cart could obtain compensation for that injury as "an accident arising out of" his employment.

On December 8, 1909, which was a very cold day with rain and sleet at intervals, the applicant's right hand became very cold and began to ache; the following day his hand and arm began to swell, and eventually he became unable to work, and applied for compensation under the Workmen's Compensation Act, 1906. The county court judge, who was assisted by a medical referee, found as a fact that the injury to the applicant's hand was caused by something in the nature of a frost-bite sustained by him while delivering bread on December 8, but added that there was nothing in the nature of the applicant's employment which exposed him to more than the ordinary risk of cold to which any person working in the open was exposed on that day. With reference to one fact which was particularly relied on, namely, that the applicant had frequently to take off his right-hand glove in order to give change, the county court judge held that this, though probably convenient, was not necessary. For these reasons the county court judge refused to award compensation, though he settled the amount payable in the event of his decision being reversed. The applicant appealed. The appeal was heard on November 14, 1910.

COZENS-HARDY, M. R. This is an appeal by a workman whose claim to compensation has been disallowed by the county court judge.

The facts are simple and not really in dispute. (Having stated these, his Lordship continued:—)

In order to maintain his claim it is necessary for the applicant to prove that there was a personal injury by "accident" arising "out of" and in the course of the employment. That the injury was received in the course of the employment is clear, but it is contended that there was no accident, and that the injury did not arise out of the employment. I feel considerable doubt whether there was an accident within the meaning attributed to that word by this Court and by the House of Lords. But I assume this point in favor of the applicant.

It remains to consider the words "out of." If I may venture to quote my own words in *Craske v. Wigan*, (1909) 2 K. B. 631, at p. 635, where a cockchafer frightened a lady's maid sitting at an open window, with the result that her eye was injured, "it is not enough for the applicant to say 'the accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further and must say 'the accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger.'" Can that be said in the present case? I am unable to see that there was any peculiar danger to which the applicant was exposed, beyond that to which

that large section of population who are drivers of vehicles, or who are otherwise engaged as out-of-door laborers, are exposed.

The case of *Andrew v. Failsworth Industrial Society, Ltd.*, (1904) 2 K. B. 32, upon which the applicant mainly relied, has, I think, been somewhat misunderstood. In that case it was found as a fact by the county court judge that the man, who was working on a scaffold at a considerable height, was exposed to more than the normal risk of being struck by lightning, and Lord Collins, then Master of the Rolls, said, at p. 35: "If there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment." And this Court declined to interfere with the award. On the other hand, the Court of Appeal in Ireland in *Kelly v. Kerry County Council*, 42 I. L. T. 23, held that a workman employed in a road who was killed by lightning was not entitled to compensation, on the ground that the accident did not arise out of his employment.¹

In the present case the county court judge says that there was nothing in the nature of the applicant's employment which exposed him to more than the ordinary risk of cold to which any person working in the open was exposed on that day. He adds that one fact only was relied on, namely, that he had to take off his right-hand glove in order to give change, and that this, though probably convenient, was not necessary. In the face of this finding of fact, with which we can not interfere, and which, so far as I can gather from the evidence, was perfectly correct, I think it is impossible for us to reverse the decision of the learned county court judge. In my opinion the appeal fails and should be dismissed with costs.

FLETCHER MOULTON, L. J. There remains the question whether this accident arose out of the employment. I am obliged to confess, and I do it with all humility, that I can not see that this admits of doubt. The man's employment required him to go his rounds on this bitterly cold day and deliver the bread to the customers and to do all the acts necessary thereto. This involved exposure of the right hand, and it was this exposure which brought on the frost-bite. The severity of the cold to which he was thus compelled by his employment to expose himself is shown by the nature of the injury, inasmuch as such injuries from cold are rare in this country, though common enough in northern or Continental climates, and it is obvious but for the requirements of his employment he could have protected himself from such severe cold either by not going out on rounds such as he was required to make or by properly protecting his hand from the cold. The direct connection between

¹ See accord: *Lindauer Co. v. Hoening*, Report of Wisconsin Industrial Commission, July 20, 1914, p. 79, compensation denied to dependents of a workman struck by lightning while working on a dam in a river, "the hazard from lightning of working near water" being no different from that of "ordinary out-door work."

the exposure necessitated by his employment and the injury is further shown by the fact that it was only the hand so exposed that suffered. I confess that I can not picture to myself a more typical case of an accident arising "out of" the employment.

The judgment of the learned judge of the county court shows that he thought himself permitted and even bound to compare the man's employment with other employments in order to ascertain whether the accident arose out of the applicant's employment. To my mind this is *falsa demonstratio*. The law does not say "arising out of his employment, and out of that employment only." Other employments have nothing whatever to do with the question. A shepherd who has to bring in his sheep in a snowstorm and suffers frost-bite or loses his life thereby is the victim of an accident arising out of his employment none the less because a railway guard or a night watchman or a postillion be equally exposed to the weather. The comparison of one employment with another is to my mind wholly illegitimate.

It is true that when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter it does not arise "out of the employment," because the man is not specially affected by the severity of the weather by reason of his employment.

The true issue could not be better expressed than it was by the Irish Court of Appeal in *Kelly v. Kerry County Council*, 42 I. L. T. 23, when dealing with the question of the death by lightning of a man working on the roads. They found that the accident did not arise out of his employment because there was no evidence that in following his employment he ran any greater risk of being struck by lightning *than any other person who was within the area of the storm*. This was a sound view by reason of the fact that lightning is indiscriminate in its action, and persons at home or abroad, at work or unemployed, run substantially equal dangers. But when a case arose of a man who by reason of his employment was exposed to the danger of lightning to a greater degree than other persons within the area of the storm, this Court in *Andrew v. Fails-worth Industrial Society, Ltd.*, (1904) 2 K. B. 32, held that the accident arose out of the employment. It would have puzzled any scientific man to say by how much the risk was increased, or whether a woodman or a worker on electric lines or many other kinds of workmen did not run an equal risk, but the Court rightly abstained from considering such questions. The case of extreme heat or extreme cold is similar to that of such a natural agency as lightning, excepting that it is easier, as in this case, to show the direct connection between the accident and the employment. But the rule is the same. If the employment brings with it greater exposure and injury results, that injury arises out of the employment.

For these reasons I am of opinion that the appeal should be

allowed with costs here and in the Court below. It would not be necessary to send the case back, inasmuch as the learned judge has made a finding as to the amount of compensation if the applicant be entitled to it, as in my opinion he is.

FARWELL, L. J. I agree with the judgment of the Master of the Rolls, and not with that of Fletcher Moulton, L. J. I am of opinion that the county court judge was right.

I assume, as he did, without expressing any opinion on the point, that the frost-bite was an accident, and I agree with him that although it occurred "in the course of" it did not "arise out of" the employment.

I take the test as stated by Lord Collins in *Andrew v. Fails-worth Industrial Society, Ltd.*, (1904) 2 K. B. 32, at p. 35: "Was the man exposed to something more than the normal risk, which everybody, so to speak, incurs at any time and in any place" when driving in an open trap on a very cold day with rain and sleet at intervals? I can see none. The squire in his dogcart, the farmer in his gig, the butcher, the grocer, the traveller, and the carter in their carts, were all in just the same position of exposure.

Appeal dismissed.*

* It was held in *Karemaker v. S. S. "Corsican"*, 4 B. W. C. C. 295 (C. A. 1911), that the risk of having his hands frost-bitten was not incidental to the work of a sailor in Halifax, N. S., where every one who goes out in winter weather runs a risk of injury by the cold, and in *Robson, Eckford & Co. v. Blakey*, 1912 Sess. Cases 334, 5 B. W. C. C. 536, a plumber stricken by heat apoplexy while laying pipes in a trench in a road during excessive summer heat was held not entitled to compensation. Compare with these the cases of *Morgan v. S. S. Zenaida*, 25 T. L. R. 446, 2 B. W. C. C. 19 (C. A. 1909), and *Davies v. Gillespie*, 105 L. T. 494 (C. A. 1911), 5 B. W. C. C. 64, where the risk of being sun-struck was held incidental to the employment of one painting a ship in a dry-dock in a tropical port, and *Fensler v. Associated Supply Co.*, Decisions of Ind. Acc. Com. of California, Vol. 1, No. 21, p. 41 (1914).

So in *Craske v. Wigan*, L. R. 1909, 2 K. B. 635, 2 B. W. C. C. 35, it was held that to make the "character and quality of the risk depend on the number in an effort to ward off a cock-chaffer which flew through an open window by which she was working, did not arise out of her employment, and in *Amyes v. Barton*, L. R. 1912, 1 K. B. 40, 5 B. W. C. C. 117, where it was held that the death of a farm laborer from blood poisoning resulting from being stung by wasps which attacked him while at work, did not arise out of his employment, with which compare *Rowland v. Wright*, L. R. 1909, 1 K. B. 963, 1 B. W. C. C. 192, where a stableman bitten by a stable cat was held entitled to compensation, the difference being that a cat, unlike wasps, though likely to be met with in other places than stables, are "part of the necessary furniture of a stable" and maintained by and with the knowledge and consent of the owner.

See also, *Butler v. Burton-on-Trent Union*, 106 L. T. 824, 5 B. W. C. C. 355 (C. A. Eng. 1912), where the widow of a workhouse master, who, while sitting on the top of some steps leading to his room, fell down them in a fit of coughing, was deemed compensable, and *Peel v. Laurence & Co.*, 28 T. L. R. 318, 5 B. W. C. C. 274 (C. A. Eng., 1912), where compensation was denied to a workman who sprained the tendon of a finger while removing his socks on arriving at his place of work, which required him to go bare-foot.

PIERCE *v.* PROVIDENT CLOTHING AND SUPPLY
CO., LTD.

Court of Appeal, England, 1911. L. R. 1911, 1 K. B. 997.

Appeal from an award of the judge of the Birkenhead County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the widow of a man who was employed by the respondent company as canvasser and collector in the Birkenhead district. The district allotted to him was triangular in shape, each side of the triangle measuring about two miles. On September 30, 1910, while going his rounds on a bicycle, he was knocked down by an electric car and killed. The facts found by the county court judge were as follows: For some nine months before the accident the deceased had been in the habit (like many others similarly employed) of riding a bicycle for the purpose of going from place to place in the course of his work, and this was known to and not forbidden by his employers. It was no part of his duty, however, to ride a bicycle for this purpose. Although permitted, it was neither required nor desired nor encouraged by his employers. They received no benefit from it, and, as far as their interests were concerned, the work could have been done just as well, if not better, on foot.

From these facts the learned county court judge drew the conclusion that the risk of a bicycle accident was not one which was incident to the business in which the deceased was engaged, and he held that the accident did not arise out of his employment though it undoubtedly arose in the course of it. He accordingly made an award in favor of the respondent company.

The applicant appealed.

COZENS-HARDY, M. R. Notwithstanding the able arguments addressed to us on behalf of the respondents I think it clear that the learned county court judge has misdirected himself in point of law. (The Master of the Rolls read the findings of the learned county court judge, and continued.) Thus we have it that without any prohibition from his employers he did his work by going on his bicycle on his rounds. This work of course necessarily involved spending a great part of the day in the streets in this triangular area; and in the course of his duties he was beyond all doubt much more exposed to the risks of the streets than ordinary members of the public. Two points have been raised by counsel for the respondents. He says, first, that the risk of the streets is a risk to which everybody is subject, and that this man who was knocked down and killed by an electric car was not more exposed than any other member of the public; and secondly that, although the accident arose in the course of, it did not arise out of, his employment. I will deal first with the point as to risk. Is that sound in law? I think not. *Andrew v. Faileworth Industrial Society, Ltd., (1904)*

2 K. B. 32, (the lightning case) is one leading authority on that point. There the county court judge found as a fact that the man was working on a scaffold at a considerable height and was more exposed to risk than other people. Collins M. R. said: "If there is under particular circumstances in a particular vocation something appreciably and substantially beyond the normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment."

Side by side with that we find the case in the Irish Court of Appeal of *Kelly v. Kerry County Council*, 42 I. L. T. 23; 1 B. W. C. C. 94, where a man was working on the high road and was struck by lightning. He was exactly in the same position as the whole of the agricultural population of the whole of the county, and therefore it was a case in which the accident could not be said to arise out of and in the course of his employment. Then came *Warner v. Couchman*, (1911) 1 K. B. 351, in which there was a difference of opinion between the members of this Court. But I think there was no difference of opinion as to the principle applicable to cases of this kind. There was a difference as to whether the facts of that particular case brought it within or just outside that particular principle. The majority of the Court thought that the risk from frost-bite, which was the injury in question, was one to which the whole agricultural population of England is subject, and that there was therefore nothing to bring that case within the rule that this was an accident arising out of and in the course of his employment. Fletcher Moulton, L. J. thought that the man was more exposed than the rest of the agricultural population, but I do not think that there was any difference whatever in principle between any of the members of the Court in that case. Then comes the case of *McNeice v. Sinaer Sewing Machine Co., Ltd.*, 1911 S. C. 12, in the Court of Session. Upon the first point of the argument which has been addressed to us the judgment of the Lord President is a direct authority—an authority which I agree is not binding upon us, but an authority which I cordially accept because I entirely approve of the reasoning upon which it is based. There the man was a salesman and collector. Here the man is not a salesman exactly; he is a canvasser and collector; but it is impossible to draw any distinction between those two employments. He was riding a bicycle in the course of his employment and was kicked by a horse. The sheriff-substitute held that the accident did not arise out of the employment. The Court of Session held that it did, and the Lord President says this: "The only question to be determined that has been argued before us is whether 'the accident' arose out of the employment. Now I think it did. I think that it was one of the ordinary dangers to which his employment exposed him, because it is quite clear from the statements before us that his employment as

collector forced him to traverse the streets.¹ And I think, therefore, that a danger, which is an ordinary danger of the street—and I think we are entitled of our own knowledge to know that the behavior of a passing horse is one of the ordinary dangers of the street—is therefore a danger arising out of his employment.” I respectfully desire to adopt that decision and follow it in the present case upon the first point that was argued, namely, that this accident, due to a man riding a bicycle in the course of his employment, does not give him a right to claim against the company because any one else in the streets is exposed to the same risk. I think that this man was more exposed than other people. His employment exposed him to the risks of the streets practically all day long, allowing only for the intervals of going inside the houses of the people he was visiting. But then it is said that in the Scotch case the man was directed to go on a bicycle. I can see nothing in that point. If I tell a man to go on an errand I do not direct him to walk. If I know that he uses any particular mode of locomotion and do not prohibit it, it seems to me unimportant whether I direct him to use that particular mode or whether I permit him. Here on the findings of the county court judge, the use of the bicycle was known to and not forbidden by the employers: it was therefore permitted. The accident happened in the street under the circumstances I have mentioned. I think there is nothing in the point that this permitted mode of going from place to place might possibly be more risky than going on foot. For these reasons I think that the learned county court judge has misdirected himself and that this appeal must be allowed.

FLETCHER MOULTON, L. J. I am of the same opinion. I think that this case is concluded by the finding of the learned county court judge that this was a permitted mode of locomotion. It was known to and not forbidden by his employers; it was permitted although it was not directed. That being so, we can draw no distinction between that and any other permitted mode of locomotion. A man who in the course of his employment has to get about the streets may do so on foot or in a tramcar or in a carriage or motor car or on a bicycle. Each of them has its own risks and each is free from some of the risks which affect the others. We have not to balance these risks one against the other. So soon as it is clear that this

¹The Lord President (Dunedin) laid no stress on the fact that the plaintiff's employment, as salesman and collector, required him to be constantly on the street. "It is true," he said "that many members of the public are exposed to the same danger but this does not seem to me to be the criterion;" and in *Refuge Assurance Co. v. Millar*, 49 Sc. L. R. 67 (Sc. Ct. Sess. 1911), 5 B. W. C. C. 522, the same judge held that an insurance agent, who, while collecting premiums, slipped and fell on the stairs of a lodging-house, in which he thought that one of the persons owing premiums resided, could recover compensation, though the person had in fact removed from the lodgings and though there was no evidence that the particular stair was abnormal or defective. See also, *Bett v. Hughes*, note to *Greene v. Shaw*, *post*, p. 75.

mode of locomotion is permitted by the master the workman in adopting it is acting within the scope of his employment.²

BUCKLEY, L. J. The question whether the accident is the result of a risk to which all mankind are more or less exposed is in my judgment not an exhaustive test of the question whether or not the accident arises out of the employment. The words "out of" necessarily involve the idea that the accident arises out of a risk incidental to the employment. An accident arises out of the employment where it results from a risk incidental to the employment, as distinguished from a risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind. Take the case of a railway accident. It is scarcely too much to say that everybody travels by railway. But a railway guard is exceptionally exposed to the risk of a railway accident because it is his duty during his employment to be continually upon the train and exposed to possibilities of collision, derailment, and the like. His employment involves that he shall run daily and hourly a risk which a passenger runs occasionally. A railway guard who is injured or killed in a railway accident suffers from an accident arising not only in the course of but out of his employment. In the case before us the man was a collector and canvasser and for the purposes of his employment it was his duty throughout the day to be continually passing from place to place through the streets. He was thus exceptionally exposed to street accidents. He might go his rounds in various ways. He might travel on foot, or by omnibus, tramcar, or railway. He did, in fact, go on a bicycle. The learned county court judge has found that, when the accident happened, he was engaged in his duties, and that it was known to and not forbidden by his employers that he went about his district on his bicycle. The deceased was therefore using a legitimate mode of locomotion for the purpose of his duties, and in the course of his employment he had the misfortune to be knocked down by a tramcar and killed. Did the accident arise out of his employment? In my judgment it did. I agree that it might have happened to a man who was not a canvasser and collector, but this man was by his employment specially exposed to that danger. There was no evidence that he was not an expert rider. If the county court judge had found that it was the first time he had gone on a bicycle, and that he had thrown himself into danger and been knocked down, there would have been plenty of room for saying that the accident did not arise out of his employment but through his own incapacity, but the learned county court judge has found nothing of the kind.

Appeal allowed.

² See *Butt v. Provident Clothing Co.*, 6 B. W. C. C. 18 (C. A. Eng. 1913), where, however, the employé while required by his employment to be constantly in the streets was injured by a fall from a bicycle which his employer neither furnished nor authorized him to use and whose use it would have forbidden had it been known.

GREENE v. SHAW.

Court of Appeal, Ireland, 1911. 46 Ir. L. T. 18.

The deceased was a herd upon two farms, who usually went from home to the farms by bicycle, with the sanction of his employer. He was setting out on his bicycle to go to one of the farms one day, when his own dog got in the way and upset him, inflicting injuries from which he died two days later.

An appeal by the employer from an award of the County Court Judge of Kildare.

FALCONER, K. C., and WHITTAKER for the appellant (the employer), FFORDE for the respondent (the defendant).

The learned County Court Judge found that the death was caused by accident arising out of and in the course of the employment.

BARRY, L. C. This is a sad case, and we are more than usually anxious to arrive at the real truth. While Mr. Falconer was arguing the case, it seemed to me that the law was absolutely settled in his favor. I confess, however, that I was greatly affected by *Pierce's Case* (1911) 1 K. B. 997, 4 B. W. C. C. 242 cited by Mr. Fforde in his very able argument, because I would myself be prepared to come to the conclusion that the man was acting in the course of his employment. He was going from the house on one farm, where he lived, to the other farm to see cattle, and upon that branch of the case *Pierce's Case* seems to carry Mr. Fforde's contention the whole way, but on examination there appears to me to be a clear distinction. Buckley, L. J., said in that case that the accident was one that might happen to any man, but the court based their judgment on the fact that the applicant, having to be constantly on the streets in the exercise of his employment, was more exposed than other persons to street dangers. There was no special exposure of this unfortunate man to the dangers of this road. He passed over it perhaps twice a day; he was not continually exposed to the risks of it in the same way as the canvasser in London.

CHERRY, L. J. I concur. I agree with the Lord Chancellor as to the ability with which Mr. Fforde argued the case. He put the case very clearly, and as well as it could be put by any counsel. I think there was some confusion as to whether the accident arose out of and in the course of the employment. It did arise in the course of the employment. The employment was as a matter of fact continuous, and the man was going from one farm to the other. Did the accident arise out of the employment? That is the real critical point, and upon that point I can not distinguish this case from the *Kitchenham Case*. There must be proof that the accident arose out of a risk which is, in some way, peculiar to the business in which the workman was engaged. It need not necessarily be a risk peculiar to that business alone. This is what distinguishes *Pierce's Case* and *M'Neice's Case* (1911) S. C. 12; 48 Sc. L. R. 15; 4 B. W. C. C.

351. A canvasser going through the streets was held to be peculiarly liable to the risk of being run over. Though the risk itself was not peculiar to the employment, the amount of risk was greater there than in the case of many other persons using the streets. Here we have a man obliged once or twice a day to go over a quiet country road; that is different from the case of a man going through a crowded street. Under these circumstances, with regret I may say, I am obliged to concur in the decision overruling the finding of the County Court Judge.

Appeal allowed.¹

KINGHORN v. GUTHRIE.

Court of Session, Scotland, 1913. 50 Sc. L. R. 863.

An appeal by the employer from an award of Sheriff-Substitute Guy, of the Sheriff-Court at Edinburgh.

LORD SALVESEN. The facts in this case are very simple. It appears that the respondent, who was a carter in the employment of the appellant, was engaged with his horse in the appellant's yard, which is situated near West Bowling Green Street, Leith, when he was struck by a sheet of corrugated iron which was blown off the roof of an adjoining building, a distance of about 70 feet. It is said—I do not think it is material—that the roof of the same building which was of an unsubstantial character, had been blown off on three or four previous occasions within the last few years, but there is nothing to suggest, so far as the knowledge of the appellant is concerned, that it had not been replaced in a suitable manner.

I put the question that was put by the Lord President in the case of *Rodger*, (1912) S. C. 584; 5 B. W. C. C. 547—What were the special risks incident to the employment of this workman? I should have thought the risk of being kicked by his horse, or of being in-

¹ *Accord: Sheldon v. Needham*, 30 T. L. R. 590 (C. A. Eng. 1914), charwoman sent out to mail a letter slipped on a banana peel left on the pavement and broke her leg; *Hopkins v. Michigan Sugar Co.*, 150 N. W. 325 (1915), where it was held that the risk of slipping and falling on icy streets was not one incidental to the claimant's employment as inspecting engineer of six sugar factories, the fall which he sustained while running for a street car on his way home from an inspection trip being held not to arise out of his employment; and see the case of *Windén v. Com. Power Co.*, 20 Detroit Leg. News 39, where, however, the claimant fell on ice on his own premises on his way to water his master's horse which he kept in his own stable; see also, *Rodger v. Paisley School Board*, 49 Sc. L. R. 413 (Sc. Ct. Sess. 1912), 5 B. W. C. C. 547, school janitor sent on errand on a hot day fainted from the heat and fractured his skull, with which compare *Milliken's Case*, 216 Mass. 293 (1914), driver during a fit of loss of memory alighted from the wagon and wandered into a swamp, thereby contracting pneumonia.

Contra: Bett et al. v. Hughes, 52 Sc. L. R. 93 (Sc. Ct. Sess. 1914), coachman sent on bicycle to post-office for mail, the majority of the court held that to make the "character and quality of the risk depend on the number of times which the workman is called upon to face it," would set up an absurd criterion, Lord Johnston, *diss.*

jured in the course of driving his horse through the traffic along the streets; but certainly no one would have said that one of the risks of his employment as a carter was that a piece of corrugated iron might come down from a neighboring building seventy feet away and hit him on the shoulder and face. That is not what one would describe as an ordinary risk. It is an extraordinary occurrence—a thing that might occur when a great gale is blowing. The workman is not specially exposed to that risk because of his employment. It may be that the locality is one which is windy, or it may be a locality where the houses are less substantial than they are in other parts of the town; but that is not a risk arising out of his employment, for any person frequenting the yard would be exposed to exactly the same risk. It is, of course, true that he would not have met with the accident unless he had been in that particular place, and that he would not have been in that particular place unless he had been engaged in that particular employer's work; but, as the Master of the Rolls said, that is not enough; you must point to something in the nature of the employment that makes you peculiarly liable to a risk of that kind.

Now, the only case that presents some difficulty at first sight is the case to which we referred—*George Anderson v. Adamson*, (1913), 50 S. L. R. 855; 6 B. W. C. C. 874 (*ante*)—in which the First Division held the other day that an accident occurring through a slate falling on a person who was working in a back-green was, upon the admitted facts of the case, an accident arising out of the employment. But then we have not the same facts admitted in this case as were admitted there. The two facts which were admitted there, and which seem to me to differentiate this case entirely from that of *Anderson*, are, in the first place, that the man there was stooping over his work and was therefore unable to avoid a danger from above; and, in the second place, that other workmen who were in the same place, but who were not compelled to stoop, were able to avoid, and did in point of fact avoid, exactly the same danger to which he succumbed. It was held by the First Division that the workman's special employment had appreciably increased the risk of accident of this particular kind; and upon that ground, although the Court thought it was a narrow case, they did not interfere with the decision at which the Sheriff had arrived.

The present case is quite distinguishable from that of *Anderson*; and we would be opening the door very wide—it has already been opened pretty wide in workmen's compensation cases—if we were to hold that because a man is employed in a particular place, therefore any accident which occurs to him in that place because of the nature of its surroundings is an accident arising out of his employment. I think that would be going a great way beyond any of the decided cases. I have therefore no difficulty in holding that we should sustain the appeal, and hold upon the facts stated that the Sheriff was not entitled to find in law that the accident to the respondent arose out of his employment.

LORD DUNDAS. I do not entertain so clear and confident an

opinion as my brother Lord Salvesen about the way in which this case ought to be disposed of. I have had, and still have some doubt about the matter, but I do not press it so far as to dissent from the conclusion proposed, in which I understand your Lordship and my brother Lord Guthrie concur. I confess I find it rather difficult to point to any really substantial or satisfactory distinction between this case and that of *George Anderson v. Adamson* (*supra*), decided a few days ago in the other Division. Then again, the Sheriff-Substitute is, of course, the master of fact, and the question here is largely, though not entirely, one of fact. But your Lordships, as I understand, all consider that upon the facts found the arbiter was not entitled in law to hold as he has done, and having stated my doubt about the matter I do not propose to say anything more.

The LORD JUSTICE CLERK and LORD GUTHRIE delivered judgments concurring with that of LORD SALVESEN.

Appeal allowed.¹

(c) "Is caused to a workman."

MALONE v. CAYZER, IRVINE & CO.

Court of Session, Scotland, 1908. 1908 Session Cases 479.

Appeal by the applicant against the decision of the Sheriff-Substitute of Glasgow in favor of the employers. In an arbitration under the Workmen's Compensation Act, 1897, between Mrs. Mary Ann Mullen, or Malone, pursuer, and Cayzer, Irvine & Co., ship-owners, defenders, the pursuer claimed compensation for the death of her husband.

The Sheriff-Substitute (Davidson) sustained a plea that the application was irrelevant, and dismissed it. An appeal was taken.

LORD PRESIDENT. The facts which gave rise to the controversy here are certainly somewhat out of the common. It is an arbitration under the Workmen's Compensation Act, the claimant in it being the widow of a workman called Malone, who was in the employment of the respondents, Cayzer, Irvine & Co. The averments of the claimant and appellant set forth that while Malone was at his work in May a splinter of iron flew into his right eye. That of course was an ordinary accident in the course of his employment, which, had he survived, would have entitled him to make a claim for compensation in the ordinary way. It seems that he had many years before

¹ So where the occurrence is one which might occur anywhere, yet if the employe's work surroundings are such as to increase its injurious effects, the resulting injury is held to arise out of the employment. Compare *Wicks v. Dowell*, L. R. 1905, 2 K. B. 225, and *Shaw (Glasgow) Ltd. v. Macfarlane*, 52 Sc. L. R. 236 (Ct. of Sess. 1914), with *Rodger v. Paisley School Board*, 49 Sc. L. R. 531 and see *Chitty v. Nelson*, 126 L. L. J. 172 (1908), 2 B. W. C. C. 496.

lost the sight of his other eye, and the injury was such that the sight of his remaining eye, according to the averments, immediately began to fail, and became gradually worse until he was rendered almost blind. Then, continues the claimant—I now read textually—"In consequence of said injury the said John Malone received a severe shock, and his nervous system completely broke down. Owing to the gradual loss of sight in his right eye, and consequent blindness, the said John Malone's mind became affected, and he became insane, and on August 20, 1907, he committed suicide in his house at 401, Rutherglen Road. The death of the said John Malone was due to the aforesaid accident, which arose out of and in the course of his employment with the respondents."

Now, upon that statement of the facts, the learned Sheriff-Substitute before whom the case came as arbiter dismissed the application as irrelevant. The claimant has appealed to your Lordships, and the motion before us is to send the case back to the Sheriff and tell him to allow a proof of those averments which I have read. Of course there can be no question, I take it, as to the accident having actually happened—that is to say, the splinter going into his eye, but what happened afterward is evidently matter upon which there may be controversy.

The expression in the statute is that the death must be the result of the injury, and really the views which I hold have been so extremely well expressed by Lord Collins when he was Master of the Rolls that I prefer to take what he has said rather than try to re-express them myself. The passage which I am going to cite is taken from the case of *Dunham v. Clare*, (1902) 2 K. B. 292. The state of the facts in that case was that a man was carrying some heavy pipes, one of which slipped and fell on his foot, inflicting a wound in his toe. He was put into a hospital, and a disease called phlegmonous erysipelas supervened. The evidence was that erysipelas of this description was a very unusual consequence of a wound of the kind, and that, according to the theory which at present obtains, was caused by the introduction somewhere or other of a germ. Lord Collins says this: "The applicant for compensation therefore has to show an accident causing injury and death or incapacity resulting from the injury. In the present case there was admittedly an accident causing injury, and the only question is whether death in fact resulted from the injury. If death in fact resulted from the injury, it is not relevant to say that death was not the natural or probable consequence thereof. The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after-consequences. In dealing with an obligation created by the Act we are not dealing with a case of contract or tort or with a liability of a criminal nature. In the case of a contract, a person who commits a breach of it is liable for the consequences which naturally follow from the breach. So, too, in cases of tort, when the question arises whether a person

is liable in respect of a breach of some duty imposed upon him, he probably, and in some cases certainly, comes under a somewhat larger liability than would be the case if it were a breach of contract, but still the liability is measured by what are the reasonable and probable consequences of his breach of duty. That lets in the consideration of reasonableness. No question of reasonableness comes into the present discussion. The Act has imposed the liability irrespective of any error of judgment or negligence on the part of the employer. The only question to be considered is, "Did the death or incapacity in fact result from the injury?" That exactly expresses my opinion, and if that is so I think that the Sheriff-Substitute was too quick here in dismissing this case as irrelevant upon the face of it.

I do not think I ought to say much more, except to explain that I am not very far from saying that upon the face of this pleading there is evidently made out a case, because the question is whether causation is or is not made out, and it may be a somewhat uphill matter for the claimant to prove her case. I should like to say that she will have to do something more than say simply that there was a possibility of death arising from such an injury in such a way—she must show that it was in fact the result of the injury. I have some doubt as to whether the state of knowledge of cerebral pathology is so fixed as, in circumstances like this, to enable one to reach such a conclusion, but I do not think we could try the matter from our own ideas on such subjects. Therefore I am of opinion that we should remit the case to the Sheriff-Substitute, and order him to allow an inquiry into the matters averred.

LORD M'LAREN. If we were to criticize the statements of facts in this case with the same strictness which we do in questions of relevancy in actions in this Court, there is a great deal I think to be said against the relevancy of the averments, because I can not gather from the Sheriff-Substitute's statement anything more than this, that the man committed suicide in consequence of the depression of mind brought on by his blindness. There is no averment of insanity in the physiological sense of a result of disease of the brain, but merely that a man has committed suicide, and is supposed to have done so under some insane impulse. It seems to me that in construing the Act of Parliament, and particularly the beginning of the first schedule, we must hold that when the Act prescribes as a condition of compensation that death results from an injury, what is within the contemplation of the statute is a material injury with death materially resulting from it. To explain what I mean regarding insanity—if a person, being a workman, were to receive a blow or wound on the head which set up inflammation of the brain, and a medical expert came to the conclusion that the injury to the brain was the result of the blow on the head, and if the injury went on and left the man in an insane condition, from which eventually he died, then I should not for a moment doubt that the man's death was the result of the accident. But, on the other hand, it is easy to figure cases of death resulting only from the moral effect of an accident.

If, for example, a man in consequence of the loss of his sight took to drinking and shortened his life by intemperance, that would be a very clear case for not giving compensation, because although in a sense death was the result of the injury, it was not a material but a moral result. Now, in this case I am not disposed, any more than your Lordship, to construe the statement of the Sheriff-Substitute, which is merely an echo of the averments of the party, with great strictness. I think there ought to be a proof, and as the parties might wish to bring the case before us again, I hope the Sheriff-Substitute will direct his attention to the point whether this is insanity that would be proved by medical evidence of the symptoms, or whether it is anything more than a just mode of stating the supposed cause, because there must be some cause for the suicide. I agree that it is desirable to have the facts brought before us, and I notice that in the case of *Dunham v. Clare* (*sup.*), which your Lordship cited, there had been an inquiry, and the judgment of the Court proceeded upon a statement of the facts proved in the case.²

CHAPTER II.

Serious and Wilful Misconduct.¹

JOHNSON *v.* MARSHALL, SONS & COMPANY, LTD.

House of Lords, 1906. Law Reports (1906) Appeal Cases, 409.

Appeal by the applicant from the judgment of the Court of Appeal reversing the decision of the Judge of the Gainsborough County Court and remitting an award made on an application for compensation.

² *Accord: Brown v. Kent*, L. R. 1913, 3 K. B. 624, scarlet fever proved to be due to lowered vitality consequent upon the injury originally sustained, *Adams v. Thompson*, 5 W. C. C. 19 (C. A. Eng., 1911); *In re Burns*, 105 N. E. 601 (Mass. 1914), blood poisoning from bed-sores of workman paralyzed by an accident, who in consequence was forced to lie for a long time in one position; *Newcomb v. Albertson*, 85 N. J. L. 435 (1914), abscess on the thumb due to the persistent rubbing of a splint improperly put on a broken arm. In *Yates v. So. Kirby Collieries*, L. R. 1910, 2 K. B. 538, 3 B. W. C. C. 418, compensation was allowed for incapacity caused by the nervous shock caused to a miner assisting in the rescue of another by the horrible character of the latter's injury though no physical impairment or disease resulted; *Pugh v. London, Brighton etc. R. Co.*, L. R. 1896, 2 Q. B. 248; *Eaves v. Blaenclydach Colliery Co., Ltd.*, L. R. 1909, 2 K. B. 73, 2 B. W. C. C. 329 and *Milwaukee v. Industrial Commission*, 151 N. W. 274 (Wis. 1915). See however, *Bellamy v. J. Humphries & Sons*, 6 B. W. C. C. 53 (C. A. Eng., 1913), with which compare *McCoy v. Michigan Screw Co.*, 147 N. W. 572 (Mich. 1914).

¹ Sect. I (2) (c) British Workmen's Compensation Act of 1897, 60 & 61 Vict. 37 provided that "if it be proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman any compensation claimed in respect of that injury shall be disallowed. The same clause

LORD LOREBURN, L. C. My Lords, I agree with the Court of Appeal that the result of the hearing in the County Court was unsatisfactory. Mathew, L. J., went further and held that judgment ought to be entered for the applicant. That is also my opinion. The facts so far as they are material have not been disputed. A workman was found fatally injured in a lift in his employers' workshop without a load and no one was allowed to use the lift unless he was in charge of a load. That is all we know. It was an accident and the widow, now appellant, must have compensation, unless the employers can prove that the injury was "attributable to the serious and wilful misconduct" of the workman. That the burden of proving this was on the employers is beyond question. We are not dealing with negligence, but with something far beyond it and we are applying a remedial statute. I can perceive no evidence of serious and wilful misconduct. No doubt it was misconduct to enter the lift when not in charge of a load for that was a disobedience of orders lawfully given. It was "wilful" in the sense that the man presumably entered of his own accord but the word "wilful" I think imports that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment.² Further, the Act says that it must be "serious," meaning not that the actual consequences were serious but that the misconduct itself was so. If a servant was found once using the front door instead of the back door contrary to orders it would be misconduct no doubt. Could any one say that it was serious misconduct? So here, the lift was intended for use by workmen in charge of a load, forbidden to workmen not in charge of a load. The offence was not that the man used it but that he

appears in the act of 1906, 6 Edw. VII, Chap. 58, except that the words "unless the injury results in death or serious and permanent disablement" all inserted before the last three words "shall be disallowed." Serious and wilful misconduct is made a bar to compensation in all cases, as in the British Act of 1897, in the Acts in force in California, Connecticut, Massachusetts, New Hampshire and the Wisconsin Act of 1911. In some of these it is coupled with intoxication, see note 1 to *Nekoosa-Edwards Co. v. Industrial Commission*, post, p. 90. In Nebraska compensation is refused for injuries resulting from wilful negligence—which is defined as consisting of (1) deliberate act or (2) such conduct as evidences reckless indifference to danger or (3) intoxication. In Michigan it is denied if the injury results from the intentional and wilful misconduct of the injured workman. In Ohio, Oregon, Texas, Washington and Wisconsin compensation for intentionally self inflicted injuries is refused. While in Iowa, Louisiana, Maryland, Minnesota, Nevada and Rhode Island compensation is denied when the injury is caused by "the wilful intention of the injured employé to bring about the injury or death of himself or another."

² So a boy at work on a screw cutting machine, who, acting "on a sudden impulse, tried to pick out of the moving machine a screw which had fallen from its place," was held not to be guilty of "wilful" misconduct, *Reeks v. Kynoch*, 18 T. L. R. 34 (C. A. Eng. 1901), 4 W. C. C. 14. See also, the ruling of the Michigan Industrial Accident Board in *Krause's Case*, 3 Bulletin of Mich. Ind. Acc. Board, p. 12, citing a similar ruling of the Wisconsin Commission; but see *United Collieries Ltd. v. McGhie*, 41 Sc. L. R. 705, 8 Fraser 808 (Sc. Ct. Sess. 1904), where, though the sheriff found that the deceased miner broke the rule in question "presumably from absent-mindedness," the Court of Session set aside his ward based on his finding that in so doing the deceased was not guilty of serious and wilful misconduct.

used it without a load. I can not agree that a lift is an appliance so dangerous that the use of it when believed to be in proper condition and intended for use does of itself amount to serious misconduct. Certainly it is for the arbitrator under the Act to decide questions of fact but when there is no evidence it is for the Court to interpose.³ Accordingly I am of opinion that an order should be made declaring the applicant entitled to compensation and directing the County Court Judge to assess the amount.

LORD JAMES. My Lords, in order to determine this case it is necessary to bear in mind the scope and object of the Act. The main object was to entitle the workman who sustained injury whilst engaged in certain employments to recover compensation from the employer although he was guilty of no default. The intention was to make "the business" bear the burden of the accidents that happened in course of the employment and relief from this liability is not found even if the injured workman be guilty of negligence. The doctrine of contributory negligence was superseded by the Act. But it was thought that if no check was placed on the workmen they might be induced recklessly to induce accidents of a serious character affecting many lives and much property and so the Act contains the provision that if the workman be guilty of "serious and wilful misconduct" he will be disentitled from recovering compensation. Now it is impossible to give any general definition of the words "serious and wilful misconduct;" application of them must be made to each case as it arises. But the use of the word "serious" shows that misconduct alone will not suffice to deprive the workman of compensation. The class of misconduct that would do so might well be represented by such instances as if a workman whilst working in a mine in certain seams of coal struck a match and lit his pipe or if he walked into a gunpowder factory with nailed boots, refusing to use the list slippers provided for him. Of course these are but instances illustrating conditions of absolute disregard of the lives and safety of many. But on the other hand misconduct may well exist that is not "serious" in its nature and therefore does not destroy the right to compensation. The circumstances of the case before your Lordships may be dealt with by way of illustration. A lift is provided in a factory, the object of the employer is that it shall be used by men when in charge of loads and notices forbidding other use are placed in the factory. I will assume that without the fact being brought to the knowledge of the employer or his representatives the workmen generally and the deceased man on the occasion in question used this lift although they were not in charge of any loads; but from the nature of things no danger could be anticipated from the use of the lift. It was intended to be used by men ascend-

³The earlier English cases regarded the question as one peculiarly for the County Court Judge, on the other hand the Scottish Court of Sessions freely reversed awards for injuries or deaths due to the deliberate breach of safety rules—particular statutory rules, *Daily v. Watson, O'Hara & Cadzow Coal Co., United Collieries Co. v. McGhie*, cited in note 3 to *Bist v. London & S. W. Ry.*, *post*, p. 87.

ing and descending. If there was a load in the lift the danger of its use could not be diminished, possibly it might be increased. No result producing injury to any one could be anticipated by the use of the lift by the individual workman. The misconduct therefore is reduced to the bare breach of a rule from which breach no injuries actionable or otherwise could reasonably be anticipated. Does this amount to serious misconduct? In my opinion it does not. I think that there is a test which may fairly be applied. 'Supposing that the employer, on learning that a workman had travelled in the lift without a load, had dismissed him without notice and that in consequence an action had been brought by the workman. The question whether the misconduct was sufficient to justify the dismissal without the notice contracted for would be for the jury to determine. I feel sure that most juries would certainly hold that no ground for dismissal had been shown. Yet I think that the words of the statute "serious misconduct" represent a higher standard of misconduct than that which would justify immediate dismissal. I think it worthy of observation that although it ought, under the circumstances that occurred at the hearing before the County Court Judge, to be assumed that there was no acquiescence in the user by the employer, yet the fact that the deceased man and other workmen openly used the lift, for they could not do so secretly, shows that they, at least, did not think that their conduct would be regarded as liable to much penalty. I would also add that serious misconduct can not be construed by the consequences of any act. A man may be told not to walk on the grass. He does so, slips up and breaks his leg. The consequences are serious but the misconduct is not so. If the case were sent down for a further hearing the only material fact which could be added to those already proved would be that the employer had no notice of the user of the lift. In giving this judgment I have assumed that such was the case. I therefore think that all the facts are sufficiently before your Lordships to enable you to form a final judgment in the case and mine is that the applicant is entitled to recover.

LORD ROBERTSON. My Lords, the question whether two adjectives and a substantive involving censure are appropriately applied to a particular act clearly ascertained would be one which might well cause difference of opinion. I own that I take a somewhat stricter view than appears to prevail in the House to-day and think that a breach of the regulation directly relating to personal safety might well come within the language of the section if committed intentionally and of choice, even although the thing done did not involve anything morally censurable. But the question being one of conduct is one of circumstances and I justify my acquiescence in this reversal on the ground that I am not confident that we really know how or why this man came to enter the lift.

LORD ATKINSON. My Lords, I concur, though not without considerable doubt, in the opinion that, while there was evidence before the County Court Judge upon which he might legitimately have found that the deceased man had been guilty of wilful misconduct

on the occasion of the happening of the accident which caused his death, yet that evidence did not amount to proof that his misconduct, though wilful, was in addition serious within the meaning of the Act. In none of the authorities to which we have been referred has it been attempted to define serious misconduct. It is scarcely susceptible of precise definition. What amounts to serious misconduct in any given case is a question of fact to be determined by the Judge of first instance on the facts of that case and the function of the Court of Appeal and of your Lordships' House is confined to deciding the question of law whether there was any evidence to sustain this finding. In the present case the misconduct of the deceased consisted wholly and entirely in his having deliberately and in disregard of the express prohibition in writing of his employers, of which he must be taken to have been aware, used for his own purposes as a passenger lift a certain hoist erected by his employers in their factory and designed and intended by them to be used only for the carriage of goods, the workmen in the factory being forbidden to use it except when bringing up or down the loads of goods of which they were in charge. It was proved in evidence that the men frequently disregarded the notice and used the lift as a passenger lift but it was found as a fact by the Judge that this illegitimate user was unknown to the employers. No evidence whatever was given to show that there was any difficulty in using the lift or that the deceased was unacquainted with the proper method of managing and controlling it or that any accident had ever resulted from the use of it authorised or unauthorised. There was no person in exclusive charge of the lift and it appeared to have been managed and controlled on each occasion of its use by the man or men who required to use it. Under these circumstances one must I think come to the conclusion on the evidence that there was no reason to apprehend any immediate or proximate danger in the unauthorised use of the lift or that the deceased knew or believed that there was any risk or, if risk at all, any but a very remote risk of injury or accident to himself, his fellow workmen or to the machine itself. The necessity which undoubtedly exists for the strict maintenance of discipline amongst the hands engaged in factories and other establishments where machinery is used and the grave dangers which might result if any general laxity of discipline were permitted tend to render important breaches of rules adopted for the conduct of business which in other places and under other circumstances might fairly be regarded as trivial; and it is the consideration of this secondary effect of the disobedience to orders or of violation of rules which causes me to entertain great doubt as to the correctness of the conclusion to which I have come. I do not find however that much reliance was placed upon these considerations in the authorities to which we have been referred. The danger that if men engaged in mines or factories are permitted without risk of loss to transgress in small things they may be tempted to transgress in great things was not insisted upon and indeed, if by reason of this secondary effect of the violation of rules unimportant in themselves the

wilful misconduct of a workman has always to be regarded as serious, the word "serious" might be regarded as surplusage and the position of the workman would be rendered worse than it was before the Act was passed. In *Rumboll v. Nunnery Colliery Co.* (1899, 80 L. T. 42; 1 W. C. C. 28), *Reeks v. Kynoch* (1901, 50 W. R. 113; 4 W. C. C. 14), and *Smith v. South Normanton Colliery Co.* (1903, 1 K. B. 204; 5 W. C. C. 14), the Court of Appeal apparently considered that it was not every violation by a workman of a rule, general or special, framed for the regulation of the industry in which he was engaged or every deviation from or disobedience to the orders of a manager or superior however wilful which could be regarded as necessarily amounting to serious misconduct. Indeed, if the word "serious" used in this connection is to have any force or weight given to it at all, it must I think mean at least that where the risk of loss or injury resulting to any person or thing from the doing of any particular act is very remote or where the loss or injury, even if probable, would be trivial in its nature and character, the doing of that act, however wilful, does not amount to "serious misconduct" within the meaning of this statute, sufficient to deprive an injured workman of the benefits conferred upon him by the statute, unless the indirect influence of the act upon the discipline of the factory is to make every transgression serious. In *Rumboll v. Nunnery Colliery Co.* (*sup.*) the rule deliberately violated by the men, a rule which they had shortly before the happening of the accident been directed by the deputy-manager to carry out in a particular way, namely, a rule requiring that the roof of the mine should be adequately propped, was one of those rules the neglect of which amounted to an offence against the Coal Mines Regulation Act, 1887 (50 & 51 V. c. 58), subjecting the offender to a penalty of £2 at the least to be recovered summarily. The breach of that rule was deliberate. There was no question about that. The danger caused by the neglect of it was grave, immediate and well recognised and its violation therefore excusable than the disregard in this case of the requirements of the notice, yet Smith, L. J., in giving judgment said that he could not regard the violation of these general rules so punishable and so necessary to be observed for the safety of the work, as in itself and as a matter of law to amount to serious and wilful misconduct. In the present case there was no evidence that the danger of loss or injury resulting to any one from the use of the lift was immediate or probable. Nor was any evidence given by the employers on many points on which one would suppose that it might have been given, such as the nature of the mechanism of this lift, the mode in which it was worked, regulated and controlled, or whether there was any means of communication between the interior of the lift and the upper floor, so that the person actually using the lift might give some warning to those on the upper floor and so prevent any attempt, by the use of the lever on the upper floor, to cause the lift to ascend or descend. For all that appears it may well be that this unfortunate accident was caused by the lift being, by the use of this lever on the top floor, suddenly made to ascend just

as the deceased had brought it to a standstill and was in the very act of getting out of it. And speaking for myself I may say that, had it been proved that such means of communication as I have indicated existed, that these means of communication were used by those legitimately using the lift, that the deceased had refrained from giving any warning and that the accident had occurred in the way supposed owing to the absence of that warning, I should have held that there was abundant evidence of wilful and serious misconduct on the part of the deceased. The employers however preferred to stand upon the letter of this notice and to rely exclusively on the infraction of their rule. They have not therefore in my opinion given any evidence to sustain the onus of proof thrown upon them by the statute and I accordingly think the appeal should be allowed.

Appeal allowed.⁴

BIST v. LONDON AND SOUTH-WESTERN RAILWAY CO.

House of Lords, 1907. Law Reports (1907) Appeal Cases, 209.

Appeal by the applicant from a judgment of the Court of Appeal (Collins, M. R., Romer and Mathew, L. JJ.), who had affirmed a decision of the judge of the Basingstoke County Court.

The County Court judge found as facts: That the deceased driver was killed by being struck by the arch of the Elvetham Road Bridge; that the deceased was so struck while standing on the tender of his engine when the train was in motion and running at a fairly high speed; that at the time the deceased went up on to the tender there was a sufficient supply of coal in the well of the tender for the purpose of firing the engine until, at all events, the train arrived at Basingstoke; that had it been necessary a supply of coal could probably have been obtained at Basingstoke of a better quality; that the deceased man was fully aware of the rule prohibiting enginem

⁴ It is not necessary that the injured workman has disobeyed a statutory or private rule promulgated by his employer, *Guthrie v. Boase Spinning Co.*, 3 Fraser 769 (Sc. Ct. Sess. 1901), 38 Sc. L. R. 483, or have disregarded an order given or has refused to use safety appliances provided by his employer, as in *Brooker v. Warren*, 23 T. L. R. 201 (C. A. Eng. 1907), 9 W. C. C. 26, it is enough that he disregards a warning of danger, *John v. Albion Co.*, 18 T. L. R. 27 (C. A. Eng. 1901), 4 W. C. C. 15; *Callaghan v. Maxwell*, 2 Fraser 420 (Sc. Ct. Sess. 1900), 37 Sc. L. R. 313; *Lanarkshire Steel Co. v. Powell*, 6 Fraser 1039 (Sc. Ct. Sess. 1904), 42 Sc. L. R. 231, or unnecessarily does an act or goes to a place obviously or notoriously dangerous to a high degree, *Leishman v. Dixon*, 47 Sc. L. R. 410 (Sc. Ct. Sess., 1910), 3 B. W. C. C. 560; but see *Mitchell v. Whitton*, 1907 S. C. 1267 (Sc. Ct. Sess.), 44 Sc. L. R. 955.

But the injury must be due to the excess of danger due to the serious and wilful misconduct. So if the workman deliberately does something involving two risks, one so serious that to run it would be serious misconduct, the other such that running it amounted at most to mere negligence, he is not barred unless the accident resulted from the serious risk, compare *John v. Albion Coal Co.* with *Rees v. Powell etc., Co.*, 4 W. C. C. 17 (C. A. Eng. 1900); *Sneddon v. Glasgow Coal Co.*, 7 Fraser 485 (Sc. Ct. Sess. 1905), 42 Sc. L. R. 365 and *Praties v. Broxburn Oil Co.*, 1907 S. C. 581 (Sc. Ct. Sess.), 44 Sc. L. R. 408.

from going upon the tender while the train is in motion; that it was not proved to his (the learned County Court judge's) satisfaction that either the low pressure of steam or the loss of time on the journey was caused by any inferiority in the quality of the coal on the engine; and, being of opinion that the facts constituted "wilful misconduct" within the meaning of the Act, he gave judgment for the employers.

LORD LOREBURN, L. C. My Lords: Everything that could be said in support of this appeal has been said, and it is not without regret, which would, I am sure, in such circumstances be common to every one, that I have come to the conclusion that it ought to be dismissed. I shall not say anything in regard to the construction of this Act, which has already been discussed in previous cases. The only question here is whether the facts which have been found admit of the interpretation which has been placed upon them by the learned judge of the County Court when he came to the conclusion that they proved "serious and wilful misconduct." This unfortunate man broke a rule which certainly is a very important rule. There was evidence that he knew of its existence, and that he knowingly and wilfully acted in defiance of it.¹ It was a rule to save life, and to prevent danger both to the public and to the servants of the company.² I can not say that there was no evidence to warrant the conclusion of the learned judge.³ It is quite true that this Act is a

¹ It is not necessary that the injured workman has disobeyed a statutory posted rule was held no excuse for its disobedience; see *Condron v. Garvin Paul & Sons, Ltd.*, 6 Fraser 29, Ct. Sess. 1904, and *McNicol v. Spiers, Gibb & Co.*, *infra*, note 2; but see *McClelland v. Fore River Co.*, 1 Cases on Massachusetts Work. Comp. Act, 122 (1913), where rules were posted in conspicuous places and when orders and warnings were given in English to a foreigner who did not understand the language, *Admonitas v. Simmon Co.*, Wisc. Acc. Bd. 1912, cited in *Bradbury on Workmen's Compensation*, 2nd Ed., Vol. 1, p. 486.

² As to how far it is important that the rule shall be one whose breach involves "danger to persons other than the person infringing it"—see Cozens-Hardy, M. R., in *Casey v. Humphries*, *Workmen's Compensation Reports* for 1913, 485 (C. A. Eng.).

³ In *Donnachie v. United Collieries*, 1910 S. C. 503 (Scot. 1910), 47 Sc. L. R. 412, it was held that where a breach of a special rule did not *per se* infer serious and wilful misconduct, it was *prima facie* evidence thereof. See also, *George v. Glasgow Coal Co.*, 1908 S. C. 846 (Sc. Ct. Sess. 1908), 1 B. W. C. C. 239, L. R. 1909, A. C. 123, (H. of L.) 2 B. W. C. C. 125; *Daily v. John Watson*, 2 Fraser 1044 (Sc. Ct. Sess. 1900), 37 Sc. L. R. 782; *O'Hara v. Cadzow Coal Co.*, 5 Fraser 439 (Sc. Ct. Sess. 1903), 40 Sc. L. R. 355; *United Collieries v. McGhie*, 8 Fraser 808 (Sc. Ct. Sess. 1904), 41 Sc. L. R. 705; but in *Dobson v. United Collieries Co.*, 8 Fraser 241 (Sc. Ct. of Sess. 1905), 43 Sc. L. R. 260, it was said by the Lord-President (Dunedin) with whom Lord Kyllachy agreed, that acting in breach of a "properly posted statutory rule (designed to secure safety of the workers or others)" "that is serious and wilful misconduct unless he can show that there was some dominant reason for breaking the rule on that particular occasion" and this whether the particular worker actually knew of the rule or appreciated the danger of what he was doing, with which compare *McNicol v. Spiers, Gibb & Co.*, 1 Fraser 604 (Sc. Ct. Sess. 1899), 36 Sc. L. R. 428, where, however, not only was the workman ignorant of the rule but it was habitually and notoriously disregarded.

In Kansas and Louisiana, the deliberate failure to use a safety guard or

remedial Act, and, like all such Acts, should be construed beneficially. Negligence will not suffice. I think that the duty of the Court is to insist that there shall be sufficient proof, and to scrutinise that proof, bearing in mind always that negligence will not suffice. But in this case I think that there was sufficient evidence, and therefore we are not entitled to disturb the decision of the County Court judge and of the Court of Appeal.

THE EARL OF HALSBURY. My Lords: I am of the same opinion.

LORD MACNAGHTEN. My Lords: I also am of opinion that the appeal must be dismissed.

LORD JAMES OF HEREFORD. My Lords: I am not disposed to differ from the opinion expressed by my noble and learned friends, but I arrive at the conclusion that the judgment is correct with considerable doubt, and certainly with very great regret. I may say at once that if I had occupied the position of the learned judge, or if this case had been submitted to a jury, and I had been one of the jury, I should not have found the finding which the learned judge has placed on the record. I think, of course, that we ought, in determining the meaning of the words "serious and wilful," to follow the judgment that was given by this House in the case of *Johnson v. Marshall*, (1906, A. C. 40; 8 W. C. C. 10), and I think, too, that we clearly expound the intention which the Legislature had in framing the statute if we hold that which is "serious and wilful misconduct" must be clearly established against the plaintiff who seeks damages. Also it occurs to me that the word "wilful" must not only mean a mere intentional breach of a rule, but it must also mean wilful with the intention of being guilty of misconduct. An instance was given, in the course of the argument, of a breach of this rule by an engine-driver leaving the footplate for the purpose of seeing what is the matter with his engine. Of course he is breaking a rule, and in one sense breaking the rule is misconduct; but he does not break it for the purpose of being guilty of misconduct in such a case; he breaks it for the purpose of doing what he conceives to be best for his employer.⁴ If there may be such a case of a breach of the rule, where the person through whose act the cause of action arises has done an intentional act, we must, before we give effect to the words "serious and wilful misconduct," see what was in the man's mind at the time that he did so break the rule. In this case when we look at the effect which is to be given to the word "serious" as controlling it, I do not think that we find that it is "serious" in consequence of the unfortunate man being killed. He did not contemplate that for a moment. Therefore the case comes to this:

to obey statutory regulations affecting the safety of life or limb is specially made a bar to compensation.

⁴In *Mihaica v. Mlagenovich et al. and the City of Los Angeles*, Dec. Ind. Acc. Com. of California, Vol. 1, No. 21, p. 14, it was held that a foreman, who had warning of the cave-in of a ditch and could have escaped was not guilty of serious and wilful misconduct in remaining to rescue a fellow-workman in peril; and see Lord Dunedin in *Dobson v. United Collieries*, 43 Sc. L. R. 260, p. 264.

Was it wilful misconduct in the mind of the man when he left the engine to go to the tender for the purpose of obtaining the coal? Was it his intention to commit an act of misconduct? He could not, I think, have contemplated any injury to anybody else but himself by leaving the engine and taking this coal from the tender; he could not have contemplated any injury to the public, to any passenger, or to the man who was working with him. I think that he forgot the existence of the bridge, and therefore did not contemplate any injury to himself. For these reasons I am inclined at present to think that if I had the responsibility cast on me of giving the primary decision in the matter, I should not have concurred with the learned County Court judge, but, as has been observed, that is not the question which we have to determine here. The learned judge had to direct himself as if he was directing a jury, and I must confess that I think that this matter was open to two views, and that two constructions could be put upon the man's conduct. The learned judge took a view contrary to that which I have suggested that he might have taken, and chose so to direct himself. I do not see that it is within our province to differ from him to the extent of saying that the judgment must be set aside.

RAYNER v. SLIGH FURNITURE CO.

Supreme Court of Michigan, 1914. 146 N. W. 665.

KUHN, J. This case is brought here by certiorari to the Industrial Accident Board. Adelbert Rayner, the applicant's husband, was injured while in respondent's factory in the city of Grand Rapids. About 100 carvers and cabinet workers were employed on the third floor of the factory, and, on the blowing of the noon whistle, each workman was required to proceed to the end of the room and punch the time clock before leaving for dinner. Mr. Rayner, who was working on this floor, about 150 feet from the time clock, on November 5, 1912, when the whistle blew at noon, started on a run from his bench to the clock to punch it. After proceeding about 30 feet, he collided with Martin De Vos, a fellow employé, whom he could not see because of drawers which were piled up on the floor. This resulted in Rayner fracturing or injuring one or more of his ribs. There had been no general notice printed or posted of a rule against running to the time clock, but, about a year previous to the accident, Rayner had been told by his foreman, Hicks, not to run to the clock. There was testimony that the rule against running had not been enforced, and no employé had been discharged because of doing so. An award to claimant, who was left as his dependent, was made by a committee on arbitration, and upon review was affirmed by the Industrial Accident Board.

With reference to the rule, the commission made a finding that such a rule had not been enforced, and its general violation had

been acquiesced in by the employer. There being evidence to support this finding of fact, by the terms of the act (part 3, § 12, Act No. 10, P. A., Extra Session 1912) it becomes conclusive, and as a result eliminates the consideration of the question as to whether the injury arose by reason of the intentional and wilful misconduct of Rayner. *Rumboll v. Nunnery Colliery Co.*, 80 L. T. 42, 1 W. C. C. 28.

The judgment and decision of the Industrial Accident Board is affirmed, with costs against appellant.²

NEKOOSA-EDWARDS PAPER CO. v. INDUSTRIAL COMMISSION.

Supreme Court of Wisconsin, 1913. 141 N. W. 1013.

TIMLIN, J. On January 23, 1913, the Industrial Commission made an award directing that the respondent pay to Mittie Smith the sum of \$2,040 on account of the death of her husband, Pat Smith, while in the employment of respondent. March 24, 1913, in an action brought for that purpose, the circuit court for Dane county set aside this award on the ground that the Industrial Commission acted in excess of its powers in finding that the death of Pat Smith was not caused by wilful misconduct.¹ The finding of the commission on this point was as follows: "The death of Pat Smith was proximately caused by accident and was not caused by wilful misconduct; that at the time of such accident Pat Smith was in an intoxicated condition which proximately caused the accident."

It is quite possible for a person to be in an intoxicated condition which condition proximately caused the accident which proximately caused the death and yet not be guilty of wilful misconduct. The drinking of intoxicating liquor is wilful in the sense of intentional, but the mere fact of drinking is not misconduct. By section 1561 any person found in any public place in such a state of intoxication as to disturb others, or unable by reason of his condition to care for his own safety or for the safety of others, is guilty of a misdemeanor. This is misconduct and if one intentionally put himself in this condition he might be said to be guilty of wilful misconduct. But there are many cases where although the drinking is

² *Accord: Casey v. Humphries*, Workmen's Comp. Reports for 1913, 485 (C. A. Eng.); *McClelland v. Fore River Co.*, 1 Cases on Mass. Work. Comp. Act. 122 (1913); *Belknap v. Merry Elwell Co.*, Cal. Indus. Acc. Bd. 1913, cited in Bradbury on Workmen's Compensation (2nd Ed.) Vol. 1, p. 493.

¹ The Wisconsin Act of 1913, § 2394-3 has changed this provision, § 2394-4, Act of 1911, and allows compensation unless the injury is intentionally self-inflicted.

Compensation for injuries due to intoxication is specifically refused in California, Connecticut, Iowa, Kansas, Maryland, New York, Louisiana, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Rhode Island, and West Virginia.

intentional the intoxication is not, as for instance where one by reason of fatigue, hunger, sickness, or some abnormal condition becomes intoxicated in consequence of imbibing a quantity of liquor which ordinarily would not so affect. While intoxication in such case to the degree specified might be a misdemeanor under the statute quoted it is not necessarily wilful misconduct within the compensation act. The intoxication might under such circumstances be the proximate cause of an accident resulting in injury or death and yet not have reached that degree specified in this statute as in case where it produced mere drowsiness.

There was evidence in the instant case that deceased was slightly intoxicated, that he drove out of the clay pit standing up on his load, that he was perfectly able to take care of himself and drive his team when last seen alive. There was, therefore, room to find upon the evidence not only with respect to the degree of intoxication, but that there was no intention or purpose to put himself in a dangerous or helpless condition of intoxication. The Industrial Commission has jurisdiction to pass on these very questions, and their finding above referred to does determine these questions. It finds that Smith was in an intoxicated condition which proximately caused the accident but that the accident was not caused by wilful misconduct. This means that he did not wilfully bring upon himself such degree of intoxication.

If we were authorized to review the evidence we might come to a different conclusion. But the statute is mandatory that the award shall not be set aside on such ground. The Industrial Board has jurisdiction to decide whether or not the intoxication which caused the death or injury was wilful, consequently it did not act in excess of its powers in deciding the negative in the instant case. There is no claim that the award was procured by fraud and the findings of fact support the award. Hence, without reaching the interesting questions put forward in the briefs of counsel, we reverse the judgment of the circuit court and direct that the award of the Industrial Commission be affirmed.

Judgment reversed, and the cause remanded to the circuit court with directions to affirm the award of the Industrial Commission.²

BARNES, J. (Dissenting). The plain unvarnished tale in this case is that Smith, an habitual toper, left his work, went to a saloon some distance from his place of employment, got a partial "jag" on, started back with a bottle of whisky, and got so drunk that thereafter, while he was driving his team over a smooth road, he fell off the wagon and broke his neck. There is no suggestion that the

² See *contra*, *McGroarty v. John Brown & Co.*, 8 Fraser 809 (Sc. Ct. Sess. 1906), 43 Sc. L. R. 598; *Truesdale v. McCarthy*, 1 Cases under Mass. Work. Comp. Act 360 (1913), and see *Lee v. Fidelity & Casualty Co.*, 1 Cases under Mass. Work. Comp. Act 316 (1913), where workman danced on the roof to show the foreman that he was not drunk; the cases cited in note to *Frith v. S. S. Louisianian*, *supra*, where, however, the serious and wilful misconduct of the deceased workman was not in issue, since under the British Act of 1906 such misconduct does not bar a dependent's right to compensation where the accident causes death.

whisky was injected into him by force or by stealth or artifice. He bought it himself and drank it alone. It was an offense under the law of Wisconsin for him to get so drunk that he could not provide for his own safety or the safety of others, for which he might have been punished had he survived. Of course if the act of drinking was accidental or automatic or a mere mechanical exercise unconsciously performed, then intent would be lacking. But there is neither finding nor evidence that such was the fact. The deceased was a seasoned veteran, having a penchant for getting drunk, who from his long experience must have known and appreciated his capacity. The commission did not find that the deceased got drunk by accident. There was no evidence in the case to warrant any such finding. It did not award damages on any such theory. It plainly says so in its decision. After holding that the claimant was drunk at the time he fell off the wagon and that the drunkenness caused his death, it says: "The question we have to decide is whether or not such intoxication is a defense against compensation." And in conclusion the commission says: "If the Legislature had so intended, we believe that it would have specifically so provided in the act." The court holds that if the claimant got drunk intentionally, that would be wilful misconduct within the meaning of the statute. The commission held that it would not be, as I read the findings and decision. It is apparent that if the commission construed the law as does the court, it would have denied recovery. This court sustains the conclusion reached by the commission in a curious manner. It in effect says that the commission found that there was no wilful misconduct. Under some circumstances drunkenness would not be wilful misconduct. Ergo the commission must have found that the exculpating circumstances existed, and its finding in this behalf is conclusive on the court.

It was not found that the deceased got drunk on an unusually small allowance of liquor because of sickness, hunger, or any other reason. Such a finding would totally lack support in the evidence. Where a party accustomed to the use of liquor drinks it until he gets drunk, the presumption is that he intended to do just what he did do. It was for the claimant to show by some facts or circumstances that for some reason or other the deceased drank less liquor than was ordinarily necessary to produce stupefaction in the instant case. No such evidence was produced. I think the circuit court was clearly right in holding that there could be no recovery, and the commission would have reached the same conclusion had it construed the law as the circuit court did and as this court does. The judgment of the court is based on a finding of fact which the commission did not make, to wit, that the deceased did not intend to get drunk. What the commission in reality concluded was that intention was immaterial because an allowance might be made for an injury resulting from intentional intoxication.

MARSHALL and VINJE JJ. concur in the foregoing opinion of BARNES, J.

CLEM v. CHALMERS MOTOR CO.

Supreme Court of Michigan, 1914. 144 N. W. 848.

MOORE, J. The first question is: Did Mr. Clem receive a personal injury arising out of and in the course of his employment? And the second question is: Was he injured by reason of his intentional and wilful misconduct? The questions are so interwoven that they may well be discussed together. Mr. Clem, with others, was employed on a December day constructing a flat roof on a large building only 19 or 20 feet high. It would add not only to the comfort of these men but to their efficiency as workers to have them about 9 or 10 o'clock partake of a luncheon, which from the fact that hot coffee was served was called a coffee lunch. The luncheon was ordered by the foreman of the company. It was prepared on the premises, and when it was ready the men were directed by the subforeman to go and partake of it. All of them started to do so. They did not in doing so leave the premises of the appellant. All of them but three went down the ladder. Mr. Clem went down the rope which projected over the eaves seven feet. If he had kept hold of the rope until he reached the end of it, if he was a man of ordinary height and his arms were of the ordinary reach, his feet would be within five to seven feet of the ground. If, when the call to come to lunch was made, Mr. Clem, in responding to the call, had inadvertently stepped into an opening in the uncompleted roof or in company with the others had, in the attempt to reach the ladder, got too near the edge of the roof and fallen and been hurt, would it be claimed that the injury did not arise out of and in the course of his employment? The getting his luncheon under the conditions shown was just as much a part of his duty as the laying of a board or the spreading of the roofing material. The injury, then, having arisen out of and in the course of his employment, can it be said that compensation should be defeated because of his intentional and wilful misconduct? His primary object was like that of all the other men to get to and partake of his luncheon. There is nothing to indicate that he intended or expected to be hurt. Nearly all the other men went down by the ladder. He went down by a rope where, if his plans had carried, he would have had to make a drop of only five to seven feet. Is that such intentional and wilful misconduct as to defeat compensation under the act? There is scarcely a healthy, wide-awake ten-year-old boy who does not frequently take a greater chance and without harm. For a man accustomed to physical toil, judged by what is occurring daily, it can not be said that such an act should be characterized as intentional and wilful misconduct within the meaning of the statute.

The allowance of the claim is affirmed.¹

¹ Compare *Mitchell v. Whitton*, 1907 S. C. 1267 (Sc. Ct. Sess.), where a farm servant in charge of a horse and cart instead of holding the reins in his hands, tied them to the breeching within easy reach, the horse sud-

IN RE NICKERSON.

Supreme Judicial Court of Massachusetts, 1914. 105 N. E. 604.

SHELDON, J. The insurer contends that this injury happened by reason of the employé's "serious and wilful misconduct," and so that no compensation can be awarded therefor. St. 1911, c. 751, pt. 2, § 2. He was employed to do general cleaning, painting and whitewashing. Some of his work had to be done near machinery and shafting, which when in motion would involve danger; and he had been directed to do this work during the noon hours, when the machinery was stopped. At about half past eleven o'clock in the forenoon of that day on which he was injured, the superintendent, in answer to a question from him about work on a wall near the moving shafting, said to him, "We will do that during the noon hour when the machinery is stopped," and told him also that it was about half past eleven and that he (the superintendent) would find out the correct time and report it to him. The employé went to work at this place about five minutes later, expecting that the machinery would be stopped at noon, when he would continue the work with the machinery at rest. His clothing was caught by a projection on the collar of the shafting, his body was drawn around the shafting, and he received injuries which caused his death.

"Serious and wilful misconduct" is a very different thing from negligence, or even from gross negligence. *Burns Case*, 218 Mass. 8, 105 N. E. 601; *Johnson v. Marshall, Sons & Co.* (1906) A. C. 409. It resembles closely the wanton or reckless misconduct which will render one liable to a trespasser or a bare licensee. See *Romana v. Boston Elevated Railway*, 105 N. E. 598, and the cases there cited on 598. Its existence under any particular circumstances is usually a question of fact. *Leishman v. Dixon*, 3 B. W. C. C. 560; *George v. Glasgow Coal Co.* (1909) A. C. 123; *Bist v. London & South-western Railway*, 96 L. T. 750.

Here the Industrial Accident Board has found, in accordance with the report of the Arbitration Committee, that this was not "serious and wilful misconduct"; that "the shafting and machinery

denly bolting, he was unable to reach the reins in time to stop it, and he was thrown out and killed; and *Cochran v. Contractors' Mutual*, 1 Cases under Mass. Work. Comp. Act 93 (1913), workman did not put up guy ropes, though warned by foreman that it was dangerous not to do so.

The general tendency of the Michigan Industrial Accident Board is to hold if at all possible that the conduct of the workman did not amount to serious and wilful misconduct, see *Goble v. Continental Motor Car Co., Dr. Denton & Co.*—cited in *Bradbury on Workmen's Compensation*, 2nd Ed., Vol. 1, pp. 491-492.

The mere fact that the particular workman did not appreciate the gravity of the risk is immaterial, if it was obvious to a reasonable man, *Dobson v. Collieries Co.*, note 3 to *Bist v. London etc. R. Co.*, ante, p. 87; as to danger obvious to adults but not to minors of the claimant's age, see *Casey v. Humphries*, *Workmen's Compensation Reports* for 1913, p. 485, per Cozens-Hardy, M. R., p. 488.

were about to stop at any moment, in the mind of the employé, when he could continue to work with absolute safety. His decision to do some whitewashing during this very brief interval seems more like a sudden thought than a wilful act. It seems that it should fairly be regarded as a minor transgression, at most, from his standpoint, and not as serious and wilful misconduct."

Unless this finding is shown to be unwarranted upon the evidence it now is conclusive. *Donovan's Case*, 217 Mass. 76; *Bentley's Case*, 217 Mass. 79; *Diaz's Case*, 217 Mass. 36. We can not say that it was unwarranted. The fact that the injury was occasioned by the employé's disobedience to an order is not decisive against him. To have that effect, the disobedience must have been wilful, or, as was said by Lord Loreburn, in *Johnson v. Marshall, Sons & Co., Ltd.*, (1906) A. C. 409, 411, "deliberate, not merely a thoughtless act on the spur of the moment."

This case comes well within the rule of the decisions which have been cited. The decree of the superior court must be affirmed. So ordered.

CHAPTER III.

Certain Employment Excluded.¹

SECTION 1.

"Casual."

HILL v. BEGG.

Court of Appeal, 1908. *Law Reports* 1908, 2 K. B. 802.

The learned County Court Judge held that there was sufficient continuity about the work to take it out of the definition of casual employment. He accordingly made an award in favour of the applicant. Mr. Begg appealed.

COZENS-HARDY, M. R. The question raised in this appeal is

¹ Section 13 of the British Workmen's Compensation Act of 1906 provides that the term "workman" does not include "inter alia" a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employé's regular trade or business. These identical words are used in the Rhode Island Act. In California the exclusion is of persons whose employment is both casual and not in the usual course of the employé's trade, business, etc., of the employer. Very similar language is used in Iowa, while in Connecticut, Minnesota, Nebraska, New Jersey and West Virginia, casual employment or employés are excluded in somewhat varying terms as to a suggested difference between a "casual employment" and an employment "of a casual nature" see *Gaynor's Case*, 217 Mass. 86 (1914). In Illinois, Michigan, Ohio, Texas, and Wisconsin, and in the Massachusetts Act of 1911, the term employé is defined as including "all persons," etc., except one whose

whether a man who was employed by the present appellant to clean windows of his private house, not by virtue of any contract entitling either the appellant to claim the man's services or the man to claim damages if not employed, is a workman entitled to compensation within the meaning of the Act of 1906. The evidence shows that for some two years when the windows required cleaning a postcard was sent to the man, who did odd jobs of this nature, and if he came he was paid 6s. 6d. a day for what he did. Sect. 13 of the Act contains a definition of "workman," which so far as is material is as follows: "Workman does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business." The appellant is a member of the Stock Exchange, and it is of course clear that the man was not employed for the purposes of his trade or business. I think the man's employment was of a casual nature. There was no engagement that he should be employed. No complaint could have been made if any other person had been employed. It was uncertain when any person would have been employed, and indeed it is not easy to frame any definition of "employment of a casual nature" which would not cover this case. A broad distinction is taken in the Act. If a man for the purposes of his trade or business employs another, it matters not that the employment is of a casual nature, such as, for example, that of a dock laborer, and the man so employed is a workman within the meaning of the Act, but an entirely different principle is applicable to the case of what, for the sake of distinction, I may call domestic engagements. I am not prepared to extend the burdens of the Act to householders who simply call in a man, not part of their regular establishment, to do a particular job as and when necessity arises. On these grounds I think the learned Judge was wrong in the view which he took, and that the appeal must be allowed.

BUCKLEY, L. J. A lady was in the habit, whenever her windows required cleaning, of sending for a certain man named Hill to clean them. There was no agreement of permanent or periodical employment, but, in fact, her practice was to send for the same man whenever the work required to be done. In that which follows I am dealing with a case of practice, but not of contract. The question is whether this man was a workman employed by the lady within the Workmen's Compensation Act, 1906.

I pause here to point out that the words are not "who is casually employed," but "whose employment is of a casual nature." I have to investigate what is the character of the employment. Is the employment one which is in its nature casual? To take an analogy or illustration from a different subject, say, land. The question is

employment is but casual or is not in the regular course of the trade, business, etc., "of his employer." (The Massachusetts Act as amended in 1914 eliminates the words "is but casual or.") The use of the disjunctive "or" in place of the conjunctive "and" leads to a very radical difference in effect, see *Gaynor's Case*, 217 Mass. 86 (1914).

what is the nature or quality of the land (is it, for instance, building land or agricultural land), not what estate is held in that land. Suppose that a host, when from time to time he entertains his friends at dinner or his wife gives a reception or a dance, has been in the habit for many years of employing the same men to come in and wait at his table or assist at the reception, it may be said that their employment is regular, but the employment is of a casual nature. It depends upon the whim or the hospitable instincts or the social obligations of the host—whether he gives any, and how many, dinner parties or receptions, and the number of men he will want will vary with the number of his guests. In such a case the waiters may not incorrectly be said to be regularly employed in an employment of a casual nature. The employment in the present case was, I think, of a casual nature. The lady might have gone abroad for some months or might have let her house, and in either of these cases the employment would, or might have, ceased. If she remained at home there was, no doubt, a well-founded expectation of employment, which would normally have resulted in employment at intervals more or less regular, but the employment remained of a casual nature. I think the Act distinctly intended that where the employment was not in a trade or business the liability of the employer should be limited to the case of servants whose employment was not casual, but stable. This employment was not of that kind, and the case is, in my opinion, not within the Act of Parliament. It results that the appeal must be allowed and the application dismissed with costs.²

KENNEDY, L. J., agreed.
Appeal allowed.

KNIGHT v. BUCKNILL.

Court of Appeal of England, 1913. 6 Butterworth's Workmen's Compensation Cases 160.

An appeal by the "workman" from an award of His Honour Judge Gye, of the County Court of Southampton.

Knight, a jobbing gardener, was employed to cut down and lop some trees in the grounds of a large private house. Nothing appears to have been said as to how long he was to be employed; the only thing that was definitely arranged was that he should be paid 3s. 6d. per day. The County Court Judge found that the employment was of a casual nature.

The "workman" appealed.

¹ *Aliter* in those states, Illinois, Michigan, Ohio, Texas and Wisconsin, where an employment is excluded if it be either casual or not in the regular course of his employer's business, trade, etc., see *Gaynor's Case*, 217 Mass. 86 (1914).

² *Accord: Rennie v. Reid*, 1908 S. C. 1051 (Sc. Ct. Sess.), 45 S. L. R. 814, 1 B. W. C. C. 324, *verſ* similar facts; *Hubbe v. Lynch*, 36 N. J. L. J. 87 (C. P. Essex Co. N. J. 1913), man called for a few hours to move furniture.

COZENS-HARDY, M. R. In this case the question is whether the County Court Judge was wrong in holding that the man who was injured was not a workman within the definition in the Act of Parliament. The point of the definition which is contained in Sect. 13 is that "workman does not include * * * a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business."

No question in the present case arises as to any trade or business. Therefore, we have only to decide whether the man's employment was of a casual nature or not. The man was a jobbing gardener. That is his own description of himself. He was engaged by Col. Bucknill in the winter time. It is in the winter time when trees requiring to be felled are usually cut down, and this is the time when a jobbing gardener has not got much to do. So he was called in by Col. Bucknill to do the job. He was not paid a weekly wage, but at the rate of 3s. 6d. a day. The fact that he was engaged by the day is not conclusive, but it can not be disregarded in deciding whether his employment was casual or not. On two occasions he was engaged to cut trees, and in the interval he was employed for levelling the lawn. It was on the second occasion when he was cutting down trees that he was injured. That was close upon five weeks after he was first engaged. During that time he was employed every day except when the weather was so bad that he could not work, and he received his wages, I presume, when the regular staff received theirs on the Saturday. In these circumstances the Judge held that the applicant was not a workman within the Act, because his employment was of a casual nature. Is it possible for us to say that the Judge had misdirected himself and there is no evidence on which his decision could be supported? I entirely dissent from that view. I am quite unable to give a general definition of casual as opposed to regular employment which would meet every case. I do not even think it desirable to define within precise limits employment which is casual and employment which is not. I prefer rather in a case like this to adhere to the illustration given during the argument. A country gentleman has what I may call his regular establishment to do his ordinary work in the garden, stables, and so forth, but at certain times in the year and for certain limited purposes he gets in persons not on his establishment to help—persons who may be got rid of without notice, and who are under no obligation to the employer to come and work. An example of this occurred in *Hill v. Begg*, (1908) 2 K. B. 802, 1 B. W. C. C. 320. It seems to me that persons such as these are persons "whose employment is of a casual nature," in the language of the Act as interpreted by this Court in *Hill v. Begg* (*supra*) and *Dewhurst v. Mather*, (1908) 2 K. B. 754, 1 B. W. C. C. 328, and by the Irish Court of Appeal in *McCarthy v. Norcott* (1908), 43 Ir. L. T. 17, 2 B. W. C. C. 279.¹ It also seems to me clear, when the question is

¹ In *McCarthy v. Norcott*, cited in principal case, a carpenter was employed to do some repairs in defendant's private house. While the repairs

subjected to that test, that this is a case in which the employment was of a casual nature, or at least that it was competent for the learned Judge to so hold.

I think that this appeal must be dismissed with costs.

BUCKLEY, L. J. Not only were there materials in this case on which the County Court Judge could arrive at the conclusion that he did, but I think that on the evidence any other conclusion would have been wrong. The question is what is meant by the words in Sect. 13 of the Act, "a person whose employment is of a casual nature." I notice that Fitzgibbon, L. J., in *M'Carthy v. Norcott*, (*supra*), has endeavored to define casual by seeking to discover its opposites and he says, "I accept this definition except that I rather hesitate at the word 'regular.' If the regular means 'periodical,' it is a mere repetition of the succeeding word, and if it means 'permanent,' it is again a repetition of one of the other words." It seems to me to be perfectly possible for a man to be employed in regular work of a casual nature, and there is a good example of that in *Hill v. Begg* (*supra*). Suppose that a host, when from time to time he entertains his friends at dinner or his wife gives a reception or a dance, has been in the habit for many years of employing the same men to come in and wait at his table or assist at the reception, it may be said that their employment is regular. But the employment is of a casual nature. Another instance is when a man who goes in for pheasant shooting, engages the same men always for his shoots as beaters. In a sense their employment is regular, but it is also casual each time he asks them to come. So for my part I should disregard the word regular and find the meaning of casual by contrasting it with permanent and periodical. In *Hill v. Begg* (*supra*), I used the word "stable" as contrasted with "unstable," meaning, I suppose, to contrast a casual employment with something in a stable condition which was likely to remain. Now what I have to consider in this case is not whether this workman was casually employed, but whether this employment was of a casual nature. What happened here was that Col. Bucknill sent for a man to fell two or three trees on his lawn. Subsequently there was a suggestion of felling some other trees, and in this interval the gardener was short of a hand and asked for help in the garden. There was no permanent employment at all, and nothing definite about the man's engagement, except that he was to be paid 3s. 6d. a day. I can find nothing in the facts from which it can be inferred that at the end of any day or week, the employer could have said to this man that he was to come again next day, or that the workman could have compelled the employer to give him notice before discharging him. There was no stability in the arrangement. The man would come when he liked and go when he liked, and the employment was entirely of a casual nature.

were in progress he agreed that when they were finished he would cut down some trees on the grounds, the pay to be 5 shillings a day, the same as for the repairs. After working three days, he was killed on the fourth, it was held that his employment was of a casual nature, see also, *Cheever's Case*, 106 N. E. 861 (Mass. 1914).

He was employed for a special job. In my view there were facts before the County Court Judge to support his finding that the man's employment was of a casual nature.

HAMILTON, L. J. I agree. There is a state of facts in which it would be impossible for a reasonable tribunal to say that work was casual, and equally there is a state of facts in which it would be impossible for a reasonable tribunal to say that it was permanent; but I am unable to formulate the test which would determine the boundary between these two conditions as a matter of law, and I think it may be inferred that when the state of facts is midway between these two states, so that the question is reasonably debatable, it must be for the County Court Judge to decide.

I offer no opinion as to the merits of the conclusion of facts, but this case is one in which I feel it is impossible to say that the award was arrived at by error of law. The appeal must be dismissed.

Appeal dismissed.

SABELLA *v.* BRAZILEIRO.

Supreme Court of New Jersey, 1914. 91 Atl. 1032.

BERGEN, J. This cause was submitted on such briefs as should be filed within the time prescribed by the rules of this court, and we have not been favored with any on behalf of the defendant in certiorari. A paper was filed by a person who claims to be an attorney at law, but he appears to be ignorant of the rule observed in this court that only those who have been admitted as counselors of this court are permitted to appear and argue cases before it. A brief filed in this court by one who has not been admitted to the degree of counselor at law will not be considered. *Hazard v. Phoenix Co.*, 78 N. J. Eq. 568, 80 Atl. 456.

This dispute requires the determination of two questions raised under the statute commonly called the Employer's Liability Act (P. L. 1911, p. 134): (a) Was the contract of employment made in New Jersey? (b) Was the employment of the deceased casual?¹ The trial court found that the contract was made in this state, and that the employment was not casual, and awarded to the next of kin compensation as provided by the statute. We think there was evidence to sustain the finding that the contract was entered into when the deceased was put to work and not until then, and, as he was really not engaged until after he reached Jersey City, the contract was made in this state. As to the other point, the evidence shows that deceased was justified in the expectation that the employment would continue at least until the ship was loaded or so long as his services were required for that purpose.² While this

¹ The language of the Act, Sect. III 23, is "exclusive of casual employments."

² So work is not casual merely because the employment is for an indefinite period, *Shacffer v. Grottola*, 85 N. J. L. 444 (1914), and *In re McAuliffe*,

class of work was not constant, depending upon there being a ship of the prosecutor in port, it appears that the deceased was frequently called upon by the prosecutors to serve them in this particular character of work, being one of a class of stevedores ready to respond when called.³ We think this supports the finding that the employment was not "casual" within the meaning of the word as expressed in the statute. The ordinary meaning of the word "casual" is something which happens by chance, and an employment is not casual—that is, arising through accident or chance—where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period.

In our opinion, the trial court correctly disposed of the questions argued on the return of the writ allowed in this cause, and the judgment is therefore affirmed, with costs.

DEWHURST v. MATHER.

Court of Appeal, England, 1908. L. R. 1908, 2 K. B. 754.

Appeal from an award of the Preston County Court judge under the Workmen's Compensation Act, 1906.

The applicant was a charwoman. On Tuesday, October 22, 1907, the applicant was engaged at the house of the respondents, Mr. and Mrs. Mather, washing clothes, and when cleaning up the cellar steps her left thumb was pricked by a pin. Blood poisoning set in as the result of the prick, and the applicant lost the use of her left hand in consequence and was permanently incapacitated. The applicant was employed by the respondents as charwoman on every Friday and every other Tuesday, and at the date of the accident she had been so employed for eighteen months. On other days she washed and cleaned for other people. The respondents disputed liability, upon the ground that the applicant was a casual employé only. The applicant stated in her evidence that when she was not able to go to Mrs. Mather she let her know. That was when she was poorly. If she had her health she went regularly every Friday and every other Tuesday without being told to go each time. If

Bulletin of Ind. Com. of Ohio, Vol. 1, No. 21, p. 145 (1914), as during the construction of a particular building, *Scott v. Payne Bros.*, 85 N. J. L. 446 (1914), or on trial, *Mueller v. Oelkers Co.*, 36 N. J. L. J. 117 (C. P. of Essex Co., N. J., 1913), and see *Clements v. Columbus Saw Mill*, Bulletin Ohio Ind. Comm., Vol. 1, No. 21, p. 161. The ruling of the Massachusetts Board in *Grogan's Case*, 1 Cases under Workmen's Compensation Act 231 (1913), accord, was probably overruled by *Gaynor's Case*, *infra*, note 3, and *Cheever's Case*, 106 N. E. 861 (Mass. 1914).

³ *Contra: Gaynor's Case*, 217 Mass. 86 (1914), which, construing Part V, § 2, excluding from definition of employé's covered "those whose employment is but casual," held that a waiter taken on for an afternoon by a caterer to serve a banquet was a casual employé, though the custom of the catering business was to serve banquets by waiters so engaged and the waiters served first one caterer and then another.

other people had asked her to wash for them on the days on which she was engaged to Mrs. Mather she would not have gone.

The county court judge found that the applicant was in the regular employment of the respondents on every Friday and every other Tuesday, and that the accident occurred in the course of that employment, and he awarded the applicant 7s. a week.

The respondents appealed.

COZENS-HARDY, M. R. I think this is a reasonably plain case. The learned county court judge has held, first of all, that a wife who engages a person of this kind as a washerwoman does so as agent for her husband. It is quite clear that in a matter of that kind, although the actual engagement is made by the wife, it is made by her as agent for the husband, and the husband is liable. But then it is said that this washerwoman was not engaged under "a contract of service" within s. 13 of the Act. The evidence shows that she went on Friday every week and on alternate Tuesdays regularly, without any further instructions, and she went on other days of the week to other persons. Under these circumstances the learned judge has found, and I do not see how he could have failed to find, that there was a contract of service of a periodical nature. It seems to me to come exactly within the language of the First Schedule, clause 1, sub-s. 2 (b), which contains these words relating to the earnings of a workman: "Where the workman had entered into concurrent contracts of service with two or more employers, under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident." The Act obviously contemplates a case in which the engagement is not for the whole time, but for a portion of time with one employer and for a portion of time with another employer. That being so it seems to me reasonably plain that this is not, to use the language of s. 13 of the Act, an employment of "a casual nature." It was an employment of a regular nature. It was for definite periods, perfectly well known to both employer and employé. Then it is said that this Court, in the recent case of *Hill v. Begg*, L. R. 1908, 2 K. B. 802, decided something which ought to govern this case. I was a party to that decision, and I do not desire to qualify anything I there said; but it seems to me to have nothing whatever to do with the present case. In that case there was no agreement between the parties for either permanent or periodical employment. Here the fact was found by the learned county court judge that there was an agreement for periodical employment. That being so, it is not an employment of a casual nature, and the decision of the learned county court judge was right. The appeal therefore fails and must be dismissed.

FARWELL, L. J. I agree.

KENNEDY, L. J. I am of the same opinion. It appears to me that there was ample evidence to justify the finding of the county court judge that the applicant was employed by the respondents

under an arrangement which provided that the employment, although periodical, was to be regular—that, to use the phrase of Buckley L. J. in *Hill v. Begg*, *supra*, the employment, as well as being periodical, was stable; and if that is so, then this was not employment of a casual nature within the meaning of the Act.

Appeal dismissed.

JOHNSTON v. MONASTEREVAN GENERAL STORE CO.

Court of Appeal, Ireland, 1908. 42 Irish Law Times 268.

An appeal by the employers from an award of His Honour Judge Barry, County Court Judge of Kildare. The following statement of facts appeared on the learned Judge's note: The applicant, the widow of Patrick Johnston, deceased, with two children and five step-children of the deceased, lived in Monasterevan. Patrick Johnston was killed on May 16 by falling from a ladder while mending slates on the roof of the respondents' premises. The manageress in the respondents' employment employed a slater named White to repair the roof. Later on in the day White said to her it would be better to get a man to assist him. She sent the yardman to get some man at the corner. Johnston came in. She asked him how much would he want for the remainder of the day. He said 2s., and she agreed to that, and he went to work. The next she heard was about three o'clock when she was told that he had fallen and was killed. She merely employed him for the half day. It was her duty to have the premises in proper condition for the carrying on of the business. The shop assistants live in the dwelling part of the house, which is over the shop.

Counsel for the respondents asked His Honor to note, as a matter of law, that Patrick Johnston, at the time of his death, was a person whose employment was of a casual nature, and who was employed otherwise than for the purpose of the employers' trade or business.

His Honor held, as a matter of fact, that the employment of deceased was of a casual nature, and also as a fact that it was for the purpose of the employers' trade or business that he was so employed. His Honor awarded the widow £150.

The employers appealed.

FITZGIBBON, L. J. The intention seems to be that where a permanent employé would have a claim for something done for the purposes of the business, then a person casually employed to do the same thing should get compensation.

SIR S. WALKER, Bart., L. C. We are all of opinion that the County Court Judge was right in this case, and that his decision can not be disturbed. We are satisfied that this man who was employed to assist a slater who was repairing the roof of the house was so employed for the purposes of the employers' business. (His Lordship referred to s. 4 of the Act of 1897, "work ancillary or incidental

to business.") The premises in question were entirely used for the purpose of the trade or business carried on therein, the upper portion being devoted to the accommodation of the assistants who worked in the shop. It is of importance that a house used for trade should be in a proper state of repair, and business could not be carried on unless there was a roof over the premises. It is merely a matter of degree whether the repairs were being done to a part of the roof or to the entire roof.

FITZGIBBON, L. J. The evidence of the manageress shows it was part of her duty in carrying on the business to keep the premises in proper repair, and it was in the exercise of that duty that she employed this man to assist in the repairs. Accordingly, I think there was evidence to support the finding of the County Court Judge.

HOLMES, L. J., gave judgment to the same effect, but intimated that he confined his decision strictly to the particular facts of the case.¹

BARGEWELL v. DANIEL.

*Swansea County Court, 1907. 123 Law Times Journal 487.
Court of Appeal, England, 1907. 98 Law Times Reports 257.*

Application for compensation in the Swansea County Court.

The workman was a laborer who sustained injury while he was engaged in whitewashing some houses owned by the employer, the injury being a broken rib caused by a fall from a ladder.

The facts appear from the judgment.

HIS HONOR. I have come to the conclusion that I must take into consideration the whole facts and all the surrounding circumstances, because it is rather difficult to decide the question on any particular test. The Legislature itself has not applied an exhaustive definition of what is service, but on the whole of the surrounding circumstances I have come to the conclusion that here there was a service. The applicant is a laborer, and Mrs. Daniel herself has said he came to her as such. It is admitted and is clear on the cases that it makes no difference whether payment is by the piece or by day. The applicant had done work for the employer the day before and had been paid by time, while on the occasion in question he was given money to get materials and paid by the piece. His usual wages were from £1 to £1 5s., which would be the usual wages of a laborer, and I can not regard him as anything more than a workman who was paid by the piece. In this case he was to pro-

¹ *Accord: Cotter v. Johnson*, 45 Ir. L. T. R. 259 (C. A. Ir. 1911), 5 B. W. C. C. 568, carpenter employed as a casual laborer to repair the defendant's farm buildings; *Gunther v. Knickerbocker Co.*, Decisions of the Industrial Commission of California, Vol. 1, No. 21, p. 46 (1914), man called in from street and promised twenty-five cents for moving machinery in defendants' creamery; *Tombs v. Bomford*, 106 L. T. R. 823 (C. A. Eng. 1912), 5 B. W. C. C. 338; and compare *Rennie v. Reid*, note 2 to *Hill v. Begg*, p. 97.

vide his own materials, and that fact would go in support of the view that he was a contractor. But here everything must be taken into consideration; that he was doing the work himself and was letting himself off to get a livelihood by doing work of that kind—and, in my opinion, that substantially was his occupation—that he was doing work for people and being paid sometimes by the hour and sometimes by piece. Therefore I hold that the employment was that in which the relationship of master and servant subsisted,¹ and I award 10s. a week.

Award in favor of the workman.

From this decision the defendant appealed.

Albert Parsons and J. Davies-Williams for the appellant.—The plaintiff was not employed under a contract of service, but as an independent contractor, and not as a workman. But if that is not so, his employment was of a casual nature, and he was not employed for the purpose of his employer's trade or business, and, therefore, under sect. 13 of the Act he is not a "workman" within the meaning of the Act of 1906. He is, in fact, excluded by that section.

Clive Lawrence for the respondent.

COZENS-HARDY, M. R. I think this appeal must be allowed. I desire to express no opinion at all on the first point; but the learned County Court Judge has found here that the work was casual work, and the employment temporary and of a casual nature. Therefore, the plaintiff was not a workman within the Act unless he was employed for the purposes of the employer's trade or business. It is not suggested the defendant was carrying on a trade. Was she carrying on a business in which the plaintiff could be employed? It seems to me she was not. She was owner of a few houses and co-owner of some other houses, of which she collected the rents and otherwise managed. This casual laborer was employed to white-wash some of those houses. The learned judge appears to have treated her as carrying on the business of a house agent. But sect.

¹ As to what is an independent contractor as distinguished from a laborer or workman compare *Simmons v. Faulds*, 17 T. L. R. 352 (C. A. Eng. 1901), 3 W. C. C. 169; *McGregor v. Dausken*, 36 Sc. L. R. 393 (Sc. Ct. Sess. 1899); *Hayden v. Dick*, 5 Fraser 150 (Sc. Ct. Sess. 1902), 40 Sc. L. R. 95; *Chisholm v. Walker & Co.*, 1909 S. C. 31 (Sc. Ct. Sess.), 46 Sc. L. R. 24, 2 B. W. C. C. 261; *Ryan v. Tipperary County Council*, 46 Ir. L. T. R. 69 (C. A. Ir. 1912); *Byrne v. Baltinglass Rural District Council*, 45 Ir. L. T. R. 206 (C. A. Ir. 1911), 5 B. W. C. C. 566; *Burnham & Co. v. Taylor*, 1910, S. C. 705 (Sc. Ct. Sess.), 3 B. W. C. C. 569, and *Vamplew v. Parkgate Iron Co.*, L. R. 1903, 1 K. B. 851 (C. A. Eng.), 5 W. C. C. 114, with *Dunlop v. McCready*, 2 Fraser 1027 (Sc. Ct. Sess. 1900), 37 Sc. L. R. 779; *Boyd v. Doharty*, 1909 S. C. 87 (Sc. Ct. Sess.), 46 Sc. L. R. 71, 2 B. W. C. C. 257; *Paterson v. Lockhart*, 7 Fraser 954 (Sc. Ct. Sess. 1905), 42 Sc. L. R. 755, and *Evans v. Penwyllt etc. Co.*, 18 T. L. R. 58 (C. A. Eng. 1901), in which last case the facts were very closely similar to *Vamplew v. Parkgate Co.*, L. R. 1903, 1 K. B. 451 (C. A. Eng.) 5 W. C. C. 114. See *Cheever's Case*, 106 N. E. 861 (1914). And compare the American cases of *Skinner v. Stratton Fire Clay Co.*, *McAllister v. Nat. Fire Proofing Co.*, and *In re McDonough*, Bulletin Ind. Com. of Ohio, Vol. 1, No. 21, pp. 103, 107 and 152; *Jacob Rider v. Little Co.*, 3 Bulletin Ind. Acc. Board of Mich. 27, with *In re Johns* and *In re Monroe*, Bulletin Ind. Com. of Ohio, Vol. 1, No. 21, pp. 172 and 186.

13 of the Act provides that a workman within the Act does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business. The intention was that the Act should not apply in such a case to the ordinary owner of property who was not carrying on any trade or business. On that short point it seems to me that this appeal must be allowed.

MOULTON, L. J. I am of the same opinion. I think the interest which the defendant had in this property was such that for the purposes of this case we must treat her as having all the rights of the owner of these houses, and under the circumstances of this case I think it would be putting an unnatural meaning on the Act to say she was carrying on any trade or business.

FARWELL, L. J. I agree. The fact that the defendant herself was the owner of these houses appears to me to exclude the notion that in doing what she did she was carrying on a business.

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